SUPREME COURT, U. S.

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IN THE

Supreme Court of The United States

October Term, 1968

No. 1406

WESTWARD COACH MANUFACTURING COMPANY, INC., and RAY GRAINGER, Trustee in Bankruptcy of Westward Coach Manufacturing Company, Inc.,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit entered in the above cases on January 9, 1968, rehearing denial entered on February 7, 1968.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Indiana is reported at 258 F.S. 67, 150 U.S.P.Q.

495. The opinion of the Court of Appeals for the Seventh Circuit is reported at 388 F2d 627, 156 U.S.P.Q. 437. Such opinions are appended hereto (App. pp. 2 and 50.)

JURISDICTION

The judgments of the United States Court of Appeals for the Seventh Circuit were made and entered on January 9, 1968, and the petition for rehearing was denied on February 7, 1968; and copies thereof are appended to this petition in the Appendix at pp. 50 and 66. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED IN TERMS AND CIRCUMSTANCES OF THE CASE

This controversy involves the denial, by summary judgment, of the protectability for Westward of its trademark rights in "Mustang" for campers and trailers, against the subsequent use by Ford's closely-related use on sport cars. Westward had fore-warned Ford many months prior to Ford's production entry; and that notice contained a specific warning that the public might assume Westward was affiliated with Ford. Very widespread and intensely strong actual confusion has been shown, which has severely injured Westward (even though the glittering success of Ford's "Mustang" for Ford might cause an unthinking person, on a first-glance supposition, to jump to an erroneous conclusion that Ford's use would automatically benefit Westward).

By far the greatest bulk of the actual confusion (and of the injury), so far learned of, has been of an unusually extreme (although forewarned) type; that is, instead of

a usual or "free-ride" situation where the public assumes the second user to be affiliated with the first user, the public has here assumed that Westward is a dependent affiliate of Ford. In contrast to the usual "free ride" motive of a second user, here the second user's motive seems more aptly termed a wanton and reckless disregard; and the particular type of widespread affiliation-confusion, shown actually resulting, has been designated to be "reverse" from the usual type. However, rather than its bad effect on Westward's goodwill being *reverse* from the usual bad effect of a free-ride type of infringement, its effect has been, even worse, an infinite *forward* extension of the usual loss of its goodwill on its own products, to a large extent not merely a goodwill-jeopardy but a goodwill-dissipation altogether.

Yet the Court below affirmed a summary judgment for Ford, asserting that "reverse confusion" provides "no rational basis for support" of Westward's cause, ignoring the widespread and goodwill-jeopardizing and forewarned confusion.

Thus the controlling question is:

Does the basic rationale of trademark protection (i.e., the protection of an earlier user's goodwill against jeopardy by a subsequent closely-related use) permit as an exception to protectability of one's own mark for his own products, a forewarned second use which is in a very close and overlapping field, and which by promotional expenditures vastly greater than the earlier user's does not only likely prejudice the earlier user's goodwill by a small nick but actually extends the affiliation-confusion forwardly to the ultimate point where the affiliation-supposition has become indeed "reverse" and the public

thinks the earlier user is a dependent affiliate of the other, or thinks it is actually the earlier user who is attempting to cheat, or has other adverse effects.

(The Appellate Court also be-littled Westward's $1,800,000 sales as having been small in proportion to the entire recreational vehicle sales; be-littled Westward's interstate usage, with nationwide advertising, as having been in only 28 of the 50 states; be-littled and ignored Westward's many exhibits and affidavits (on summary judgment) from competitors and other sources to the effect that Westward's mark was strong on its products, by asserting that Plaintiffs "could not rely on the mere allegations of their complaint" as to that issue; be-littled Westward's advertising expenditures of $93,000, admittedly paltry in comparison to Ford's subsequent exploitation. However, the questions involved in such defenses are set forth in the argument rather than here duplicated, particularly because the great weight of all judicial and treatise authority treats these and other asserted defenses as of no avail (except as to amount of damages) where actionable confusion is even merely likely (in this type of case involving a non-descriptive word and which does not involve any attempt whatever by the earlier user to monopolize a product design or any unpatented article). Thus the dominant and controlling issue is the "protectability against reverse confusion.")

CONSTITUTIONAL PROVISIONS, STATUTES, AND F.R.C.P. INVOLVED

The pertinent portions of United States Constitution, (Art. I, Sec. 8 and the Fifth and Fourteenth Amendments) are set forth in the Appendix hereto at p. 88, 15

U.S.C. 1114 at p. 71, Burns Indiana Statutes Ann. Sec. 66: 142-144 at p. 72, and F.R.C.P. 56 at p. 88.

STATEMENT OF THE CASE FACTS

Plaintiff Westward Coach Manufacturing Company, Inc., was the family-owned successor to Westward Coach Manufacturing Company, which had been established in 1960 by E. Edward Enochs; and the two companies have, consecutively, since 1960, used the trademark "Mustang" for campers, and since 1962 also for travel trailers (App. 20.) Their "Mustang" products enjoyed a very high reputation as a quality product at a quality price (App. 74, 77, 79, 81, 82, 84, 85), were extensively nationally advertised (App. 78, 84, 86), and enjoyed the highest or 5-star rating by a national trade journal (App. 81). Sales had grown from $31,000.00 in 1960 to several hundred thousand dollars per year (App. 24, 84). Westward had developed a property right for its mark "Mustang" for its products, as the District Court expressly found (App. 78, 86, 33).

Westward's continually developing goodwill had brought in so many orders that it had been forced in 1963 to turn away four times its business because it lacked production capacity (App. 83), and therefore planned, before Ford's entry, to quadruple capacity (App. 83); and that extensive building program was completed in 1964 (App. 83, 84). Its advertising was over $133,000.00 from 1960 to 1965, with sales volume over $1,800,000.00 (App. 24).

In 1962, Westward saw an advertisement of a Ford "display car" named "Mustang," and immediately wrote to Ford, specifically calling attention to Westward's prior use, and advising that a confusion would be likely, and specifically that a reverse affiliation-confusion would be

likely which would have injurious effect to Westward (App. 67-68).

Ford's vice-president replied, by letter, be-littling the matter; and he assured Westward that Ford honored trademark rights of others, and asserted that there was no likelihood of confusion, the Ford use being only for a "display car" (App. 70-71).

Following Ford's commercial "Mustang" entry in 1964, and in spite of 1964 and 1965 being good years of sales in the recreational vehicle field (App. 79), Westward's sales fell short of expectations (App. 83), and it took many money-losing steps to bolster sales (App. 85). Dealers, particularly those who handled non-Ford automobiles, were lost; and others who also were non-Ford car dealers could not be cultivated (App. 77, 78, 82). Business got so bad that bankruptcy ensued in the winter of 1965 (App. 55).

Westward had obtained an Indiana state trademark registration in January, 1962 (App. 52), and in October, 1962 had applied for federal trademark registration, which was granted as Reg. No. 834,606 on September 5, 1967 (App. 53).

Confusion, caused by Ford's entry, was shown to be very likely from not merely one but several standpoints: Joint dealerships (App. 26, 54, 82); joint promotions (App. 54, 81, 86); joint display in advertising and use (App. 79, 80, 81, 83, 86, 87); joint terminology (App. 54, 80, 85, 87); other automotive manufacturers are in the trailer field (App. 56, 83, 86); a common market of users and dealers, as the Trial Court expressly found (App. 26, 56), etc. Both are overall-type pleasure vehicles for highway use, having similar components such as seats

and bodies, and similar attributes such as roadability, weather-tightness, etc.

Confusion was learned to be actual, and widespread over many states (App. 74-75, 76, 77, 82, 60), and so strong that persons could not be convinced that their mistaken assumption was wrong. (App. 76). A very small proportion of the actual confusion was of a "customary" type involving such matters as mis-directed mail. The great proportion of the actual confusion was of a "reverse-type" supposition that Westward was a dependent affiliate of Ford (App. 74, 75, 76, 77, 82, 60).

Subsequent to the plaintiff Westward's bankruptcy, which was several months after this action was instituted, the Trial Court added as a party plaintiff Ray Grainger, Trustee in Bankruptcy (App. 55).

In the bankruptcy sale, Mr. Enochs, as well as the many creditors, had been designated to receive the greater proportion of all recovery from Ford. This entire arrangement was sanctioned by the Bankruptcy Court (App. 55). After all, it was the only apparent means for avoiding the many creditors' losses as well as for giving some salvage compensation to the Enochs family for the loss caused by the shattering of their growing family business in which they had so personally invested their money, time, and personal effort and personal sacrifices in the building up of the promising business.

After the Trial Court's summary judgment for Ford, the Enochs family moved to be added as named plaintiffs (App. 51), primarily to minimize the actual (even though improper) reliance by the Trial Court upon the view of the bankruptcy buyers as to the pre-bankruptcy history they had not experienced. This motion to be added was

denied by the Trial Court; and The Appellate Court affirmed the summary judgment and the denial of intervention.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The federal jurisdiction was founded upon diversity of citizenship, the matter in controversy exceeding, exclusive of interest and costs, the sum of Ten Thousand ($10,000) Dollars. Westward's United States Trademark Registration was not issued until the case was on appeal, September 5, 1967. (No. 834,606)

REASONS FOR GRANTING THE WRIT

1. The Court Of Appeals Has Rendered A Decision In Conflict With Other Federal Authorities, By Denying Or Ignoring The Recognized Basis of Trademark Protection

"Reverse confusion-nature" is not properly an exception to the protectability of a trademark on one's own goods; for, rather than reversing the effect on the earlier-user, it more (not less) jeopardizes his own goodwill. And protection against *any* reputation-jeopardy is consistently stated by all other federal authorities as the basis of trademark protection; and is inherent in the rationale of other federal authorities, and the federal statute, which assert that even mere confusion-likelihood is the ultimate criteria of trademark protection, particularly since the requisites of palming off and direct competition have been discarded.

For example, the 2nd Circuit has seen reputation-jeopardy as the ultimate criteria of protectability at least ever since Judge Learned Hand wrote:

> "If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful. ... The defendant need not permit another to attach to its good will the consequences of trade methods not its own." *Yale Electric Corporation v. Robertson*, 26 F.2d 972 (2 Cir. 1928)

The 9th Circuit, likewise, citing the Learned Hand decision, finds protectability where the second use is not so foreign as to insure against any identification of the two. (*Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F.2d 149 (9th Cir. 1963). (After citing this case with approval in *Tisch Hotels v. Americana Inn*, 350 F.2d 609, (7th Cir. 1965), the Seventh Circuit ignored both it and *Americana* in ruling for Ford here.)

The federal trademark statute (15 U.S.C.A. 1114, quoted at App. p. 71) expressly protects against any subsequent use likely to cause confusion or mistake (without qualification or limitation as to a "frontwards" or "reverse" type). If there were ever any doubt about an exception, it was removed by the 1962 amendment which removed a perhaps-qualifying phrase (App. 71).

The federal trademark statute's parallel passage dealing with registration has been consistently interpreted by the Patent Office, and the federal Courts having appellate jurisdiction thereover, as to avoid *all* types of likely confusion, including in particular the type in which the larger user is the second user (with apparently thus

a likelihood of "reverse" type confusion). E.g., *Castle & Cooke, Inc. v. Joseph E. Seagram & Sons,* 145 USPQ 715, 716 (CCPA 1965).

The 8th Circuit, likewise, sees reputation-jeopardy protection as the basis of trademark protection:

> "Plaintiff has the right to make and keep its own reputation without intrusting it to others over whom it cannot exercise any control. ... Plaintiff's vested and existing rights cannot be overpowered merely by defendants' comparatively massive size and generous promotional expenditures." *Sweetarts v. Sunline, Inc.,* 380 F2d 923, 927, 928, 154 USPQ 459, 462, 463 (8th Cir. 1967)

Modern day treatises, citing many authorities, see protection against goodwill-jeopardy as the real basis of trademark protection, as is illustrated by the *Restatement of Torts* (Tentative Draft No. 8, April 22, 1963) Sec. 717 and 731).

And reputation and goodwill are not merely jeopardized in a "reverse confusion" case; their jeopardy is infinitely extended "forwardly" to the point where the earlier user's goodwill is in effect swallowed up or largely dissipated.

Any unthinking notion that reverse confusion would be a blessing to an earlier user is simply not true. For example, even a Ford-devoted person would not likely buy a Westward product; for he might think Westward is a cheating free-rider on Ford, and does not have the ability to succeed on its own merit. Or he might shun the Westward dealer, thinking he could buy the supposedly Ford product cheaper from a Ford dealer, or have it serviced better from a Ford dealer.

A non-Ford devotee would likely have some of the same objections; and, even stronger, he might not want to pull a supposedly-Ford trailer behind his Buick or Chrysler.

Non-Ford dealers stopped handling Westward's "Mustang" products, and others could not be cultivated. (App. 77, 78, 82).

Whatever the psychological factors of sales resistance may be, the tragic fact is that Westward's business condition grew progressively worse after the Ford confusion began, finally to bankruptcy. And continuing even today in 1968 it is still in bad financial trouble, even though it has gone through three sets of administrations still struggling to maintain the "Mustang" line, and even though product-quality and various other changes have been made.

The law cannot in good conscience force an earlier user to accept the forewarned intrusion of this nature, regardless whether it be termed "reverse" or "forward" or otherwise.

The carving out of a "reverse-permitted" exception to protectability would be a retrogressive setback to trademark law, which increasingly through many years has discarded one defense after another, as the rationale of trademark protection has yielded to the significance of goodwill-protection as being the real basis of protectability. Thus, goodwill-protection has rightly been given paramount and controlling significance where no unlawful patent-type monopoly was being attempted via the trademark enforcement. Those discarded defenses have included, e.g., requirements that palming-off be shown; that the persons confused were actual purchase-consumating purchasers rather than prospective purchasers; that diversion of business specifically to the defendant be

shown; that both goods had the "same descriptive properties," as the repealed 1905 Act had stated; etc.

Viewed simply as a matter of logic or reason, an exception as to non-protectability against "reverse confusion" cannot be upheld; for, to insist that confusion must be of the usual type of a "frontward" or free-ride effect, is to say, in effect: Protection is awarded against only a small-scale second-use which begins small and stays small and creates but a relatively small goodwill-jeopardy; but protection becomes lost if the second-use is larger with the resulting greater harm by building up a "reverse" type of affiliation-confusion. Such a "might makes right" notion is monstrously untenable.

2. The Court Of Appeals Has Rendered A Decision On A Novel Point Of Law Which Cannot Await A Conflicting Decision On The Precise Point, For Its Rationale Permits And Even Encourages A Larger Company To Crush The Goodwill Of A Smaller Company, And Retards Major Business Planning Until Clarified By This Court. Its Rationale Is Not Based On Nor Limited To Indiana Law.

The monstrous unfairness to any smaller company, of an appellate decision which so favors a larger company as to sanction a trademark violation if it is so severe as to achieve a general dissipation or "reverse-confusion" swallowing up of a smaller company's goodwill rather than merely nick it in a customary or "frontwards-confusion" manner, cries out for this Court to not await a conflicting decision on the precise point.

Big business cannot be permitted the might-makes-right temptation implicit in this decision as to a substantive point of trademark law, even if it is designated as "merely

Indiana law," particularly because a Court of the status of a Federal Appellate Court has so scoffed at the idea of protection against this type of affiliation-confusion, and because the exception to protectability was expressly asserted by the Court as not required by Indiana law in particular, nor based on Indiana law.

Big business must know that the law does not encourage a trade-mark confusion, particularly one of a ruthless "reverse-confusion" nature, for reasons already presented.

After all, the issue here involves a vital concept of business planning, usually involving many hundreds of thousands of dollars, and years of time, in choosing and promoting an identifying name for one's products. Business must not be mis-led into thinking that a small company's trademark is not protectable against an overwhelmingly larger use, which is the untenable basis of the Court of Appeals' decision.

3. The Court Of Appeals Denied Justice To Westward By Recognizing That Westward Had A Protectable Interest In The Trademark For Its Campers And Trailers, And Yet It Denied Westward That Protection To Precisely Those Same Goods. This Is A Denial Of Due Process, And Of Equal Protection, And Calls For An Exercise Of This Court's Supervision.

Westward has sought no extension of its trademark rights. Westward's goal here has related to its desire for protection of its trademark for campers and trailers, not cars; but the Courts below seemed to be wedded always to an inquiry couched in terms of whether a right "extends" to cars or on cars, although the only issue in that

regard is the protectability, *for campers and trailers*, against the confusion-breeding use which happens to be cars.

The Appellate Court acknowledges and stresses that Westward has trademark rights on campers and trailers; and since widespread public confusion as to a supposed business affiliation of these parties has been more than amply demonstrated as both likely and actual, a denial of protection against this car use is a denial of Westward's acknowledged trademark rights for precisely its campers and trailers.

It is simply a fiction to think that a user's goodwill in a mark is being protected *at all*, even in a specific industry, when his goods *of that very industry* are caused by a closely-related use to be supposed to be business-affiliated with the other user.

The whole concept of "limitation to its own industry" is thus seen to be illusory and unrealistic; and, being incompatible with the ultimate criteria of confusion-likelihood, it logically must yield to that test.

This denial of protection against a closely related and forewarned later-use is thus a denial of lawful protection on its own goods of its own industry; and regardless of how a Court rationalizes a denial of that admittedly-deserved protection, and particularly where the rationalization does not include one single case or authority less than 18 years old as to any point of substantive trademark law, its denial is a denial to Westward of its rights under the Fifth and Fourteenth Amendments; and is such a departure from logical process as to seem to require an exercise of this Court's power of supervision.

4. The Court Of Appeals Has Rendered A Decision In Conflict With Other Federal Decisions As To Supposed Defenses Of "Weak Mark" And "Third Party Uses," Further Confusing Substantive Trademark Law, For Those Defenses Are Not Based On Indiana Law.

As to the inter-related supposed-defenses of "weak mark" and "third party use," which are asserted as justifying the denial of protection here: The Court has used third party uses, which are the same *unconfusing* uses over which the Court says that Westward *does have* a legally protectable interest in the mark for its campers and trailers, to rule that Westward does *not* have a legally protectable interest in the mark *for precisely its campers and trailers.*

The inherent and illogical inconsistency of such a result is no doubt one of the reasons why modern trademark law has developed so as to effectively drop this "mark strength" test, at least where confusion is shown to be likely. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F2d 149, 153 (9th Cir. 1963). Even the 7th Circuit dropped and scoffed at the test of "mark strength" in *Americana* (350 F2d 609 at 611) where it found confusion to be of the usual type, relating to a registered mark. Yet here, to rule for Ford, the 7th Circuit resurrected a text and cases all 18 years old and incompatible with the ultimacy of the confusion-likelihood test, such as is illustrated by the *Restatement of Torts*, Sec. 717, 731.

Not only do these supposed-defenses ignore the ultimate criteria of likelihood of confusion; but unless they are recognized as inherently having to yield to the paramount consideration of confusion-likelihood, they belong only in the field of patent law inventiveness tests.

Further, there is just no logic whatever in permitting a later-comer to resurrect other uses, which the late-comer may never before have even heard of or thought much about, and which have concurrently existed with no likelihood of producing such confusion, as an escape for liability for the late-comer use which does produce confusion-likelihood.

In other words, Westward, having developed legally-recognized protectible rights on its own goods in spite of those non-confusing "third party" uses, cannot logically be denied the protection of law as to its same goods on the basis of these same "third party" uses; yet that illogical and inconsistent result is what is asserted in the Appellate Court's ruling.

The utter superficiality and unreality and non-applicability of the "weak mark" and "third party uses" supposed-defenses, in a forewarned "reverse confusion" situation such as here, where the later use is in such an extremely close field (both involving body-type overall vehicles rather than merely components), is illustrated by the following:

Suppose Westward's mark had been unquestionably technically "strong," an absolutely novel and coined word, let us say for example "ZYXLPH," never before used by any other on any other product, absolutely virgin-pure; and let us assume that every other detail of this entire "Mustang" controversy were the same except the mark was "ZYXLPH" instead of "Mustang."

In this "ZYXLPH" fact situation, who will deny that in all probability exactly the same or perhaps even *more* "reverse confusion" would have inevitably occurred as has occurred, by Ford's closely overlapping use? The

"weak mark" and "third party use" factors are thus seen to be not even relevant, in a close-use situation where confusion is likely. They are unrealistic, where confusion is likely, and they must yield to the control of the confusion-likelihood determination.

5. The Court Of Appeals Decision Is In Conflict With Basic Priciples Of Tort Law.

After all, here we have an industrial giant, with full knowledge of the victim and of the foreseeable effect on the victim, and with what must be recognized to have been in at least a reckless disregard of the jeopardy and consequences, engaging on an unprecedentedly massive scale with the identical term and in a closely related use to the established and expanding use of the smaller company, with no excuses such as descriptiveness, and with an infinite number of other marks to select from; and this has had the inevitable and foreseeable result of not only a reputation jeopardy but a major loss of identity on specifically Westward's campers and trailers, in a large effect a forced business-marriage which Westward did not want.

Even if there never had been any trademark protection ever before legally recognized, this should be held actionable on basic principles; for such a reckless and damaging course of action continually and without one reason demolishes Westward's goodwill, just as surely and inevitably and foreseeably as if Ford had stationed hundreds of men around the country, expressly proclaiming a Ford-affiliation to Westward's products.

6. The Court Of Appeals' Decision, While Asserting It Is Applying "Indiana Law," Tests A Nationwide Tort By A Rationale Which Is Not Based On Indiana Law, And Which Is Contrary In All Significant Respects To The Weight Of Authority Of Other Federal, State, And Treatise Authorities, And Which Yields An Unconstitutional Interpretation To Indiana Law.

The Appellate Court has been quite inconsistent in determining what it feels is the applicable Indiana law. It correctly sees that Indiana has not defined the boundaries of trademark protection; but then, quite inconsistently with logic, the Court proceeds to articulate for Indiana a standard of protectability substantially in departure from the ultimacy of the generally recognized confusion-likelihood test.

Moreover, the Court imposes into Indiana law, as a major part of its rationale in this case, defenses ("weak mark" and "third party usage") which find no basis in Indiana law.

A further reason to show how illogical it is for the Court to impose defenses into Indiana law which are at variance with the more protective confusion-likelihood tests of other jurisdictions are the facts that Ford's conduct has of course been nationwide, and the Indiana conflict of laws rule is that actionability is to be determined by the law of the jurisdiction of the activity challenged. (*Rekeweg v. Fed. Mut. Ins. Co.*, 324 F2d 150, 151, (7th Cir. 1963) c.d. 376 U.S. 943)

One would have thus expected that principles of comity and consistency would have persuaded the Court to determine Indiana law to be in line with the broad confusion-likelihood test of the cases which have been cited herein,

or that of other current-era authorities such as the *Restatement of Torts,* Tent. Draft No. 8, 1963, Sec. 717, pp. 53, 61; Sec. 731, pp. 103, 104.

Such errors as to an assertion of Indiana law, particularly in view of the nationwide nature of the tort and the general supremacy of the federal control by the Interstate Commerce Clause, and with no reason to bind Indiana with a protectability standard less than would be afforded by other jurisdiction and federal authorities, and, with the other errors of law already mentioned, give an unconstitutional interpretation to Indiana law, and thus violate the Fourteenth Amendment.

7. The Court Of Appeals Decision Further Confuses Substantive Trademark Law, Not Merely Of Indiana, By Imposing A Protectability-Standard For A Common Law Trademark Significantly Different From That Of A Federal Registration, Without Adequate Reason For The Distinction.

By so wholly ignoring the apparent greater protectability of a federal registration than that given here to a common law trademark, and not even looking to federal authorities or to the federal statute in even interpreting the Indiana law as to a nationwide tort, while at the same time expressly noting that Indiana law is silent on the points, the Court of Appeals has imposed upon common law trademarks, not merely of Indiana but elsewhere, a standard of protectability significantly less than that of the federal statute; and this has been not only without good reason, but as urged throughout this petition, has been against the generally-accepted basic rationale of trademark protection.

6. The Court Of Appeals Decision Still Further Confuses Substantive Trademark Law, Not Merely Of Indiana, By Relegating To The Whims Of A Single State The Nationwide Protectability Of A Clearly-Interstate Usage, Against Another Clearly-Interstate Usage.

There is nothing in the *Erie* case, or in the Court-cited *Pecheur* case of 1942, which requires a Federal Court to completely blindfold itself from the great weight of Federal and treatise rationale as to the protection to be made to the interstate commerce inherent in two clearly-national trademark usages, in a field in which the administration of a federal statute so clearly has developed past the stage of 18-year old cases by which the Court of Appeals has announced the Indiana law to be.

If the state-afforded protection for an interstate usage is given by the state to be at least substantially as much as that inherent in the basic rationale of federal trademark protection, perhaps the point is of only theoretical concern. But where the protectability-standard is so much weaker by a single state's law, the matter cannot, consistent with the Interstate Commerce Clause, be left to the whim of a single state.

Thus, an upholding of the Court of Appeals' archaeological determination of "Indiana law," considering the great disparity between the Indiana law as here determined, and the protectability-rationale elsewhere, seems obviously to require a re-examination of cases such as the 1942 *Pecheur*, by the United States Supreme Court.

CONCLUSION

In conclusion, it should perhaps be noted that even though Westward's federal registration has now been granted, and even though as argued herein the usual registration protectibility is more than that provided by the Court of Appeals here, it would be quite unrealistic for the Court to assume that our plea can be likely met by any hoped enforcement of the registration itself as to conduct of Ford occurring subsequent to the registration date of Sept. 5, 1967, rather than by this present action.

For obviously, to rely wholly on the future protectability of that registration imposes burdens substantially exceeding those of this action: (a) The registration had not issued at the time of the beginning, and in many respects the most-damaging time, of the tort, and thus it would have to be given retroactive effect in order to itself specifically control the 1964-1967 era; (b) Ford would no doubt assert this present action as *res judicata* as to the pre-1967 aspect; (c) Ford would no doubt assert that the Westward owners as of the 1967 issuance date had bought in after the Ford-caused confusion had begun and had continued, and that they had paid only a relatively little, for all ownership changes since the 1965 bankruptcy have indeed been made during the continuing financial trouble which the Ford "Mustang" entry has caused; and (d) For several reasons, it would be harder to prove specifics of actual monetary damages as to the post-issuance date than as to the pre-issuance date.

For the many reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners.

Of Counsel:

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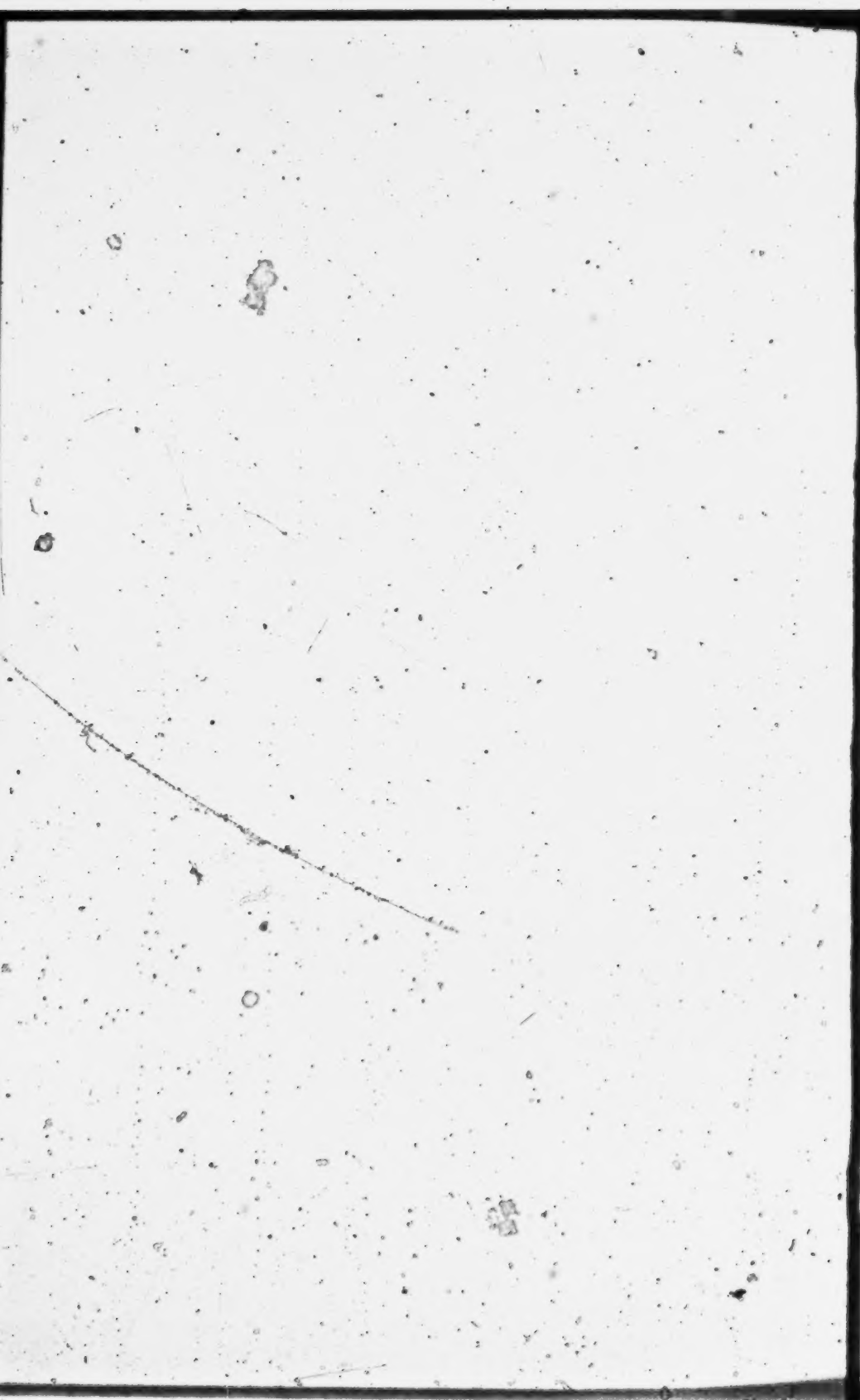
APPENDIX



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IN THE

Supreme Court of The United States

October Term, 1968

No. 1406

WESTWARD COACH MANUFACTURING COMPANY, INC., and RAY GRAINGER, Trustee in Bankruptcy of Westward Coach Manufacturing Company, Inc.,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(IP 65-C-199)

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The motion of the defendant for summary judgment on the complaint pursuant to Rule 56 (c) of the Rules of Civil Procedure, having been presented and the Court, having considered all of the showings of the defendant and plaintiffs and being duly advised, now enters its Memorandum Opinion thereon:

(H.I.)

The Court accordingly finds that the defendant is entitled, as a matter of law, to summary judgment on the complaint.

IT IS THEREFORE ORDERED, ADJUDGED AND DEGREED that the defendant's motion for summary judgment be and the same is hereby granted; that the plaintiffs have and recover nothing by their complaint, and that the defendant recover its costs and charges in its behalf expended.

Dated July 29, 1966.

/s/ Cale J. Holder
Judge, United States District Court
for the Southern District of Indiana

(IP 65-C-199)

MEMORANDUM OPINION

The plaintiff, Westward Coach Manufacturing Company, Inc., commenced its action on April 28, 1965, when it filed a three count complaint charging the defendant, Ford Motor Company, with infringement of an alleged common law trade-mark in count one; with unfair competition in count two; and with infringement of an Indiana statutory trade-mark in count three. Jurisdiction of the Court is alleged in each count of the complaint to be based upon diversity of citizenship and the amount in controversy exceeding, exclusive of interest and costs, the sum of $10,000.00. Judgment is requested in each count of

$3,000,000.00 for compensatory damages; for punitive damages; for an injunction to perpetually restrain defendant, directly and through its agents and dealers, from using the trade-mark MUSTANG with the representation of a charging horse in the State of Indiana, and throughout the world; for attorney fees, for costs of the action; and such other and further relief as is just.

ISSUES OF COMPLAINT AND ANSWER

The June 21, 1965 answer of the defendant, consisting of one defense to each of the three counts of the complaint, admitted and denied specific allegations of the complaint.

The alleged facts of count one of the complaint were realleged in counts two and three. The allegations of count one and the issue joined therewith by defendant's answer are as follows:

> The plaintiff alleged and the defendant admitted the allegations of rhetorical paragraphs one, two and three: that Westward Coach Manufacturing Company, Inc. was incorporated in the State of Indiana, with its principal place of business situated in the City of Elkhart, State of Indiana; that Ford Motor Company was incorporated in the State of Delaware, was admitted to do and was doing business in the Indianapolis Division of the United States District Court for the Southern District of Indiana; that the plaintiff and defendant were of diverse jurisdictions when the action was commenced; and the matter in controversy in the action exceeded, exclusive of interests and costs, the sum of Ten Thousand Dollars ($10,000.00).
>
> The plaintiff alleged and the defendant denied the allegations of rhetorical paragraphs four through fourteen (except the matters in parenthesis) that

The alleged facts of count two of the complaint and the issues joined therewith by the defendant's answer are as follows:

> The plaintiff alleged and the defendant denied the allegations of rhetorical paragraph sixteen: that the defendant, by its production, advertising, and/or sale of automobiles under the mark MUSTANG and/or a representation of a charging horse, had engaged in unfair competition with the plaintiff and engaged in unfair business practices by unjustly appropriating to defendant's own use and using plaintiff's property right, to-wit; plaintiff's trade-marks, on goods closely related to plaintiff's goods, and in the same general class, to-wit; vehicles, and in unduly restricting the field in which plaintiff's trade-marks are accorded exclusiveness of use; and in thereby effectively blocking the natural expansion of plaintiff's business into the mobile home units of self-propelled type for which plaintiff could otherwise exclusively use the marks in which plaintiff has built up good will sales appeal.

The alleged facts of count three of the complaint and the issues joined therewith by the defendant's answer are as follows:

> The plaintiff alleged and the defendant denied the allegations of rhetorical paragraphs eighteen, nineteen, and twenty; that the plaintiff is the owner of trade-mark registration no. 5005-839, registered January 9, 1962, which was issued by the State of Indiana for utility coaches, vehicle-carried accommodations for campers and travelers, vans, and the like; that the scope of goods protected by the registration encompasses the defendant's alleged usage, and/or the scope extends to and includes the alleged usages by the defendant for the reason that the attributes of the defendant's automobile, and/or defendant, have been transferred to the plaintiff and plaintiff's mobile home units, and there was a re-

sulting confusion to the public by the usage of the same or similar marks on such closely related goods of the same general class of vehicles, and there has resulted an undue restriction of the field in which the plaintiff's registered trade-marks are accorded exclusiveness of use, and prevented the natural expansion of the plaintiff's business; that the defendant, by its production, advertising, and/or sale of its automobile under the mark MUSTANG, and/or representation of a charging horse, in the State of Indiana, has and is violating plaintiff's Indiana State Trade-Mark Registration, and the defendant infringed on the Indiana trade-mark rights of the plaintiff protected by such registration.

HISTORY OF ACTION

It was disclosed at a scheduled pre-trial conference on January 6, 1966 that the plaintiff had recently filed a reorganization proceeding under Chapter XI of the Bankruptcy Act in the South Bend Division of the United States District Court for the Northern District of Indiana as Bankruptcy Cause Number 6191. Thereafter, on February 4, 1966, Ray Grainger, Trustee of Westward Coach Manufacturing Co., Inc., appointed by that Court, petitioned this Court to be added as a party plaintiff as authorized and directed by that Court to do. The Trustee was added as a party plaintiff pursuant to an order entered February 8, 1966.

Ford Motor Company filed a counterclaim for a Declaratory Judgment against the original plaintiff on November 4, 1965 before the addition of the Trustee as a party. The counter-defendant moved on June 29, 1966 for permission to file its late reply.

Ford Motor Company filed a Motion for Summary Judgment on February 21, 1966 upon all counts of the

complaint and upon its counterclaim. On July 6, 1966, Ford Motor Company moved to withdraw that part of its Motion seeking Summary Judgment upon its counterclaim which was granted, and that part of the Motion is stricken.

The matter is submitted for the Court's ruling upon the defendant's February 21, 1966 Motion for Summary Judgment, as amended by the defendant on July 11, 1966, removing the issues of the counterclaim for Declaratory Judgment from the Summary Judgment Motion; the evidence offered in support and in opposition to the Motion, the supporting defendant's brief filed February 21, 1966; the plaintiffs' answer brief in opposition filed March 11, 1966; the defendant's reply brief filed April 7, 1966; the plaintiffs' supplemental answer brief in opposition filed June 8, 1966; and the defendant's supplemental reply brief filed June 21, 1966. The parties waived oral argument upon the issues of the Motion. The Court being advised in the matter submits this memorandum ruling.

RECORD OF TENDERED EVIDENCE SUPPORTING AND OPPOSING MOTION FOR SUMMARY JUDGMENT

The defendant submitted in report of its Motion for Summary Judgment upon the issues of the three counts of the plaintiffs' complaint and the answer thereto the following evidence:

A) Defendant's interrogatories, numbered 1 through 68, filed October 11, 1965, and the plaintiff's, Westward Coach Manufacturing Company, Inc.'s, answers thereto filed November 30, 1965.

B) Defendant's request for admissions, numbered 1 through 35, filed October 11, 1965, and the plaintiff's

Westward Coach Manufacturing Company, Inc.'s, responses thereto filed October 25, 1965, and the amended responses to requests, numbered 22 and 26, filed November 24, 1965.

C) Defendant's exhibits, numbered 1 through 312, representing copies of trade-marks issued using the mark MUSTANG and/or the representation of a horse.

D) Defendant's exhibit 313 representing the January 9, 1962 application of E. Edward Enochs, doing business under the firm name of Westward Coach and Sales Manufacturing Co., for the registration of the trademark in issue and the certificate of registration issued thereon on January 9, 1962, by the Secretary of the State of Indiana pursuant to Chapter 174 of the Acts of 1955 as amended Chapter 256 of the Acts of 1959.

E) Defendant's exhibit 314 representing Westward Coach Manufacturing Company, Inc.'s November 28, 1962 application for a United States trade-mark registration of MUSTANG and a representation of a horse with copies of all proceedings upon such pending application before the United States Patent Office.

F) Defendant's exhibit 315 representing the affidavit of Robert J. Fisher, Advertising Manager for the Ford Division of Ford Motor Company, with the following sub-exhibits: A, B1 through B66, C1 through C84, D1 through D6, E1 through E17, F1 through F3, and G1 through G2.

G) Defendant's exhibit 316 representing the affidavit of Gordon B. MacKenzie, General Sales Manager for the Ford Division of Ford Motor Company, with sub-exhibits A and B attached.

H) Defendant's exhibit 317 representing the affidavit of P. E. Sharp, Manager of the Price Analysis Department of Ford Motor Company with a sub-exhibit lettered A attached.

I) Defendant's exhibit 318 representing the affidavit of R. E. Dikeman, Account Executive of R. L. Polk and Co., with a sub-exhibit lettered A attached.

J) Defendant's exhibit 319 representing a transcript of the January 10, 1966 proceedings for an arrangement in bankruptcy in the Matter of Westward Coach Manufacturing Company, Inc., Debtor, before the United States District Court for the Northern District of Indiana, South Bend Division, consisting of the testimony of E. Edward Enochs, president of the debtor corporation; testimony of LaMar Edward Hughes, accountant for the purchasers and an investor; Raymond J. Grainger, receiver of the debtor corporation; Joseph O. Frost, accountant for the debtor corporation; and Thomas M. Tuttle, an investor seeking to salvage the debtor corporation.

K) Defendant's exhibit 320 representing the affidavit of F. H. Bigelow, Recretional (sic) Vehicle Specialist for the Ford Division of Ford Motor Company, (with sub-exhibits B1, B2, B3 and B4 attached).

L) Defendant's unnumbered exhibit being a transcript of a deposition of E. Edward Enochs, then president of the plaintiff corporation, taken on July 22, 1965, with the following deposition exhibits, numbered 1 through 288, and sub-exhibits thereof.

M) Transcript of a deposition of Frank Rizzo, then sales manager of plaintiff, taken on July 22, 1965, with deposition exhibits numbered 1 and 2.

The plaintiffs submitted in opposition to the defendant's Motion for Summary Judgment the following evidence:

N) Transcript of a deposition of Frank Rizzo, then sales manager of plaintiff, taken on July 22, 1965, with the appended exhibits numbered 1 and 2. (Same deposition was offered by defendant).

O) Transcript of a deposition of E. Edward Enochs, then president of the plaintiff corporation, taken on July 22, 1965, with the following deposition exhibits appended and numbered 1 through 288 and sub-exhibits thereof. (Same deposition was offered by defendant.)

P) Plaintiffs' exhibit A representing the April 29, 1966 letter affidavit of E. S. Barker, president of Trailer Village Sales, Inc. of Kittery, Maine, then a dealer in plaintiffs' products.

Q) Plaintiffs' exhibit B representing the letter affidavit of April 25, 1966 and sworn to on May 3, 1966 of Costa Markos d/b/a Queen City Trailer Sales of Denver, Colorado, who had been a dealer in plaintiffs' products.

R) Plaintiffs' exhibit C representing the letter affidavit, dated April 14, 1966, and sworn to on April 15, 1966, of J. Harold Daniels d/b/a White Star Distributors of Tonawanda, New York, then a dealer in plaintiffs' products.

S) Plaintiffs' unnumbered exhibit representing the letter affidavit dated October 3, 1965 of Victor Wesselhoft, the plaintiffs' advertising agent for five years.

T) Plaintiffs' unnumbered exhibit representing the letter affidavit dated May 7, 1966 of A. Armond Lynn,

General Manager of Hill Top Auto Sales of Cincinnati, Ohio.

U) Plaintiffs' unnumbered exhibit representing the letter affidavit dated May 6, 1966 of James E. Lyboldt, a representative of Palmer's Granite Garage, Inc. of Fulton, New York, a dealer in plaintiffs' products.

V) Plaintiffs' unnumbered exhibit representing the affidavit dated April 20, 1966 and the undated unsworn supplement thereto of Howard Johnson, owner and manager of Johnson Trailer Sales of Kokomo, Indiana, a competitor dealer of products other than plaintiffs' products.

W) Plaintiffs' unnumbered exhibit representing the affidavit dated April 28, 1966 of Spencer Galbreath, owner and operator of Travel Trailer Sales of Indianapolis, Indiana, a former dealer in plaintiffs' products.

X) Plaintiffs' unnumbered exhibit representing the affidavit dated May 4, 1966 of Ivo Heckaman, president of Heckaman Manufacturing Inc. of Nappanee, Indiana, a competitor of plaintiffs, with an appended unnumbered sub-exhibit.

Y) Plaintiffs' unnumbered exhibit representing the affidavit dated April 28, 1966 of Ebert D. (Rex) Cox, Jr., executive director of Indiana Mobile Home Association of Indianapolis, Indiana, a trade association in Indiana involving recreational vehicles including "campers" and "travel trailers", with an appended unnumbered exhibit.

Z) Plaintiffs' unnumbered exhibit representing the affidavit dated May 8, 1966 of R. C. Miesel, owner of Buck's Mobile Homes, a retail mobile home sales agency of Plainfield, Indiana, a competitor dealer of products other than plaintiffs' products.

AA) Plaintiffs' unnumbered exhibit representing the affidavit dated April 29, 1966 of James H. Baker, sales manager of Johnson Chevrolet of Indianapolis, Indiana, a competitor dealer of products other than plaintiffs' and defendant's products, with an appended sub-exhibit "A".

BB) Plaintiffs' unnumbered exhibit representing the affidavit dated May 2, 1966 of Lillian Larrabee former officer manager of plaintiff.

CC) Plaintiffs' unnumbered exhibit representing the affidavit dated April 29, 1966 of Bernice R. Enochs, former secretary-treasurer of plaintiff.

DD) Plaintiffs' unnumbered exhibit representing the supplemental affidavit dated April 29, 1966 of Bernice R. Enochs, former secretary-treasurer of plaintiff.

EE) Plaintiffs' unnumbered exhibit (designated as affidavit "A" of affiant) representing the first of a series of affidavits dated May 9, 1966 of Robert A. Spray, attorney for the plaintiffs, with appended unnumbered eight sub-exhibits of letters received by Mr. Spray upon his solicitation.

FF) Plaintiffs' unnumbered exhibit (designated as affidavit "B" of affiant representing the second of a series of affidavits dated May 12, 1966 of Robert A. Spray, attorney for the plaintiffs, with appended sub-exhibits lettered A, B, C, D, E, F, G, H and I.

GG) Plaintiffs' unnumbered exhibit (designated as affidavit "C" of affiant) representing the third of a series of affidavits dated May 16, 1966 of Robert A. Spray, attorney for the plaintiffs, with appended sub-exhibits lettered A, B, C, D, E, F, G and H.

HH) Plaintiffs' unnumbered exhibit (designated as affidavit "D" of affiant) representing the fourth and last of a series of affidavits dated May 24, 1966 of Robert A. Spray, attorney for the plaintiffs, with an appended unnumbered sub-exhibit and with an appended sub-exhibit lettered A.

II) Plaintiffs' unnumbered exhibit (designated as affidavit "A" of affiant) representing the first of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff.

JJ) Plaintiffs' unnumbered exhibit (designated as affidavit "B" of affiant) representing the second of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff.

KK) Plaintiffs' unnumbered exhibit (designated as affidavit "C" of affiant) representing the third of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff.

LL) Plaintiffs' unnumbered exhibit (designated as affidavit "D" of affiant) representing the fourth of a series of affidavits dated April 29, 1966 of E. Edward Enochs, former president of plaintiff, with appended sub-exhibits lettered A, B, C, D, E and F.

MM) Plaintiffs' unnumbered exhibit designated as affidavit "E" of affiant) representing the fifth of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with appended sub-exhibits lettered A, B and C.

NN) Plaintiffs' unnumbered exhibit (designated as affidavit "F" of affiant) representing the sixth of a series of affidavits dated May 9, 1966 of E. Edward

Enochs, former president of plaintiff, with appended sub-exhibits lettered A, B, C, D, E, F, G, H, J, K, L, M and another M. (While the affidavit refers to a sub-exhibit "I" such exhibit was not attached.)

OO) Plaintiffs' unnumbered exhibit (designated as affidavit "G" of affiant) representing the seventh of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with an appended sub-exhibit lettered A, and two appended sub-unnumbered exhibits.

PP) Plaintiffs' unnumbered exhibit (designated as affidavit "H" of affiant) representing the eighth of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with an appended sub-exhibit lettered A.

QQ) Plaintiffs' unnumbered exhibit (designated as affidavit "I" of affiant) representing the ninth of a series of affidavits dated May 6, 1966 of E. Edward Enochs, former president of plaintiff, with appended sub-exhibits letterhead B, C, D, E, F, G, H, I, J and K. (No exhibit "A" was attached.)

RR) Plaintiffs' unnumbered exhibit (designated as affidavit "J" of affiant) representing the tenth of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff.

SS) Plaintiffs' unnumbered exhibit (designated as affidavit "K" of affiant) representing the eleventh of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff.

TT) Plaintiffs' unnumbered exhibit (designated as affidavit "L" of affiant) representing the twelfth of a series of affidavits dated May 9, 1966 of E. Edward

Enochs, former president of plaintiff, with an appended sub-exhibit lettered L. (No qther exhibits were attached.)

UU) Plaintiffs' unnumbered exhibit (designated as affidavit "M" of affiant) representing the thirteenth of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with appended sub-exhibits lettered A, B, M and N. (No other exhibits were attached.)

VV) Plaintiffs' unnumbered exhibit (designated as affidavit "N" of affiant) representing the fourteenth of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with an appended unnumbered sub-exhibit and appended sub-exhibits lettered A, B, C, D and E.

WW) Plaintiffs' unnumbered exhibit (designated as affidavit "O" of affiant) representing the fifteenth of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff.

XX) Plaintiffs' unnumbered exhibit (designated as affidavit "P" of affiant) representing the sixteenth of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with an appended sub-exhibit lettered A.

YY) Plaintiffs' unnumbered exhibit (designated as affidavit "Q" of affiant) representing the seventeenth of a series of affidavits dated May 9, 1966, of E. Edward Enochs, former president of plaintiff, with appended sub-exhibits lettered A, B, C, D, E and F.

ZZ) Plaintiffs' unnumbered exhibit (designated as affidavit "R" of affiant) representing the eighteenth of a series of affidavits dated May 9, 1966 of E. Edward

Enochs, former president of plaintiff, with appended sub-exhibits lettered A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T and U.

AAA) Plaintiffs' unnumbered exhibit (designated as affidavit "S" of affiant) representing the nineteenth of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with appended sub-exhibits lettered A, B, C, D, E, and another E, F, G and H.

BBB) Plaintiffs' unnumbered exhibit (designated as affidavit "T" of affiant) representing the twentieth of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with appended sub-exhibits lettered A, A1, A2, B and C.

CCC) Plaintiffs' unnumbered exhibit (designated as affidavit "U" of affiant) representing the twenty-first of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with appended sub-exhibits lettered A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q and R.

DDD) Plaintiffs' unnumbered exhibit (designated as affidavit "V" of affiant) representing the twenty-second of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with appended sub-exhibits lettered A, B, C, D, E, F, G, H, I, J, K, L, M, O, P, Q, R, S, T, U, V, X, Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, and KK. (There was no exhibit "N" attached.)

EEE) Plaintiffs' unnumbered exhibit (designated as affidavit "W" of affiant) representing the twenty-third and last of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with

appended sub-exhibits lettered A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S and T.

FFF) Plaintiffs' unnumbered exhibit representing plaintiffs' requests for admissions, numbered 13, 14, 21, 22, 52, 59, 60, 63, 64, 65, 67, 72, 79 and 80, filed January 4, 1966 and the defendant's responses thereto filed May 16, 1966.

GGG) Plaintiffs' unnumbered exhibit representing plaintiffs' interrogatories, numbered 1, 2, 27, 28, 62, 73, 74 and 77, filed January 4, 1966 and the defendant's answers thereto filed May 16, 1966.

FACTS

(A) History of MUSTANG and Horse Depiction

The word MUSTANG is not a distinctive or novel word and was not originated by the plaintiffs, their predecessor user, or the defendant. It is a noun identifying the wild or half-wide horses of the Southwest United States and Mexico descended from the stock introduced by the Spanish conquistadores. It was derived from the Spanish word "mestengo", an adjective, meaning "wild, having no conqueror". The word, as so defined, has been in common usage for over one hundred and fifty years. In 1380, a small kindgom of Nepal was founded and named MUSTANG. Since the war among the states, a United States Naval Officer who had been promoted from the enlisted classification was proudly dubbed a MUSTANG. The Southern Methodist University football team is popularly referred to as the MUSTANGS. During World War II, a famous allied attack plane was known the world over as the MUSTANG. The word was used as the name of many products before and since the plaintiff

adopted its use in the year 1960 including tractors, motorcycles, engines, trucks manufactured in England and Japan, automobile parts, cranes and clothing. It has been registered in the United States Patent Office alone and in combination with the representation of a horse as a trademark at least thirty-four times for a variety of products. It was federally registered for trailers and truck trailers prior to plaintiff's use. Plaintiff filed an application on November 28, 1962 with the United States Patent Office for registration of the name MUSTANG and a representation of a horse and before it could proceed with such application it was required to institute proceedings for the cancellation of the mark previously registered by the United States Patent Office to a trailer manufacturer on the grounds of abandonment. That application is still pending since it is opposed by White Motor Company who claims the mark as federally registered previously and in use and from whom plaintiff purchased and used for a long time on plaintiff's products the White Motor Company chrome MUSTANG hood ornament with the name "White" upon the depicted horse. White Motor Company's registered mark is the word MUSTANG for its truck engines and it is displayed prominently on the hoods of the White vehicles.

The representation of a horse in trade-marks in some form had been in use before the predecessors of plaintiffs' use and is still used on hundred of products as exampled by some two hundred and sixty-six trade-mark registrations in evidence, ten of which included the word MUSTANG. Porsche and Ferrari automobiles sold in the United States use the horse representation thereon, both before and since plaintiffs' use.

(B) Plaintiffs' Products, Adoption of and Use of Mark

E. Edward Enochs was first gainfully employed in the trailer industry as a salesman for a retail dealer in the year 1954 and continued in the retail business of the industry as a salesman of dealers and as a dealer until 1959 and early 1960. Commencing in 1959 in Phoenix, Arizona, he claims he started and completed designing in eight months a unique new trailer of wood construction that would be strong and rugged, that would be equipped with modern conveniences with livable features and a quality far superior in appearance and more modern utility features than the trailers then marketed. In casting about for a name to associate with his new product, he settled upon the name MUSTANG with the representation of a horse because his product was a wild design and idea in the industry at that time. He was then aware of the dictionary definition of the word MUSTANG and the reputation of the fighter plane of World War II named MUSTANG. Mr. Enochs built the first trailer of such design in Lafayette, Indiana, and later contracted for the construction of his designed trailers with independent contractors which practice continued until September of 1962. The business was moved to Elkhart, Indiana, in late 1960, or early 1961, and commencing in 1962 the plaintiffs commenced and have continuously since manufactured Mr. Enochs' designed trailers. Mr. Enochs' early undertakings were in his own name and later the business was conducted by Mr. Enochs as the owner in the name of Westward Coach Manufacturing Company. The business and assets were transferred to the plaintiff, Westward Coach Manufacturing Company, Inc., an Indiana corporation, when it was incorporated September 21, 1962. Plaintiffs have not applied to do business in any other state. Mr. Enochs and members of his family, up to the time

of the filing of this action, were the sole stockholders of the plaintiff corporation. Mr. Enochs, the principal stockholder, continued to be the principal executive and driving force of the corporation and members of his family participated in its developing business.

The trade-mark claimed by the plaintiffs was first used on their products in September of 1960. It has been continuously used since that time by plaintiffs. Plaintiffs' predecessor applied for an Indiana State Trade-Mark registration on January 9, 1962, and received Indiana State Trade-Mark Registration No. 5005-839 dated January 9, 1962 for the word MUSTANG and a pictorial representation of a leaping horse, the goods being identified in the registration as utility coaches, vehicle-carried accommodation for campers or travelers, vans and the like. No other state was requested to grant such a registration. Plaintiff made application for Federal trademark registration on November 28, 1962 (Serial No. 158,116) for the word MUSTANG and a pictorial representation of a leaping horse, the goods sought to be covered were utility coaches, vans, vehicle-carried accommodation for campers and travelers. The goods were changed during prosecution of the application to utility van bodies mountable on pick-up trucks and small trucks for providing trailer-type housing and storage accommodations for travelers and sportsmen, coach bodies known as campers for providing such accommodation and mountable on an associated vehicle or carrying unit such as a truck or boat unit (pontoon frame) and trailers. The United States Patent Office has not granted the application although that office, by its action letter of November 2, 1964, stated that the application appears to be entitled to registration and was duly published in its official Gazette. The appli-

cation is opposed by the White Motor Company, No. 44,753, whose filed opposition is pending. The White Motor Company has never claimed that the use of the mark by the plaintiffs was an infringement of its rights. The plaintiffs and their predecessor duly notified any known user of their mark in the trailer industry and instituted litigation against those who persisted in doing so except the White Motor Company.

The trailer industry, in which Plaintiffs' line of business is classified, manufactures to order and sells the products wholesale to dealers who retail them at suggested markup prices to the ultimate consumer. There are some direct sales by the manufacturer to the consumer. The products of the industry comprise a unit equipped for human habitation, temporarily or permanently, and are equipped to be readily moved from place to place, although the product may be equipped and adapted to other uses. There are several types of trailers, the sport types being the "pick-up camper trailer" and the "travel trailer"; the permanent type known as the "mobile home"; and the "motor home" which is possibly a compromise between the use of the "camper" and "mobile home" types. The "pick-up camper trailer" has no wheels but is generally transported by being carried on the bed of one and one-half ton pick-up motor trucks manufactured by the automotive industry made possible by the trailer manufacturers constructing trailers to the size of the motor truck bed. The "travel trailer" is usually larger than the "pick-up camper"; it has wheels but is transported by placing a device on the rear of a passenger automobile or motor truck, called a "hitch", manufactured by the automotive industry, and by this means is transported by pulling or towing of the trailer. It is adapted principally

for touring. The "mobile home trailer" is similar to the "travel trailer" except it is usually larger, for more permanent use as a dwelling, is less desirable for touring because of its size yet has the mobile feature of the trailer for relocation when desired. The "motor home trailer" is a trailer permanently attached to a motored chassis and is principally adapted for touring purposes. There are other sub-types of these trailers. The plaintiffs and their predecessor, while classified in the trailer industry, were new in the industry and had the following sales and production record:

Year	Gross Sales—Units of Trailers, All Names with Horse Emblem	
1960	$ 33,467.00	20 Units of camper trailers
1961	$183,744.45	112 Units of camper trailers
1962	$280,385.83	176 Units (174 camper and 2 travel trailers)
1963	$414,399.00	319 Units (127 camper and 92 travel trailers)
1964	$592,166.00	308 Units (94 camper and 214 travel trailers)
1965	$794,116.00	393 Units (62 camper and 331 travel trailers)

The sales and production record of plaintiffs and their predecessors with the claimed expense of advertising developing and which resulted from the use of the mark are as follows:

MUSTANG Products

Year-Gross Sales	Number Trailers	Adv. Exp.
1960 $ 31,467.00	20 camper trailers	$ 2,899.33
1961 $176,069.00	107 camper trailers	$11,256.91
1962 $248,778.00	123 camper trailers 3 travel trailers	$14,244.45
1963 $366,227.00	91 camper trailers 79 travel trailers	$22,407.10
1964 $307,801.00	66 camper trailers 90 travel trailers	$42,953.70
1965 $696,786.00	47 camper trailers 239 travel trailers	$40,185.81

The plaintiff has plans to manufacture and sell trailers of all types and did manufacture a few other types. He showed them as well as disclosed drawings of types other than those produced and sold (the camper and travel trailer types). The plaintiff's production plant and office was situated on four and one-half acres of land. The real estate and plant facilities of plaintiff are leased from E. Edward Enochs and wife. It employed fifty men. It undertook the expansion of the manufacturing plant in 1964 to four times the plant capacity of 1963 so that the plant thereafter had a seven hundred to eight hundred unit production capacity per year. The peak demand, experience taught the plaintiff, was in good weather months of March, April, May and June as weather affects sales. After the expansion, the production of units dropped below the 1963 production records but in 1965 production exceeded the 1963 and 1964 records. The plaintiff used various names on its products such as "MUSTANG", "MUS-

TANG with PENTHOUSE", "PALOMINO", "STUD", "STALLION", "COLT" and "PINTO". All, except MUSTANG, were used on economy models. The MUSTANG mark with the representation of a horse has been predominantly used and advertised on plaintiffs' and their predecessor's products throughout their existence in the industry. The design of the horse used on the products differed from one design by plaintiff's advertising agent, Victor Wessolhoft, to the White Motor Company design and to one furnished by a supplier. It was affixed in different manners, chrome and plastic replicas, decals and paintings. Plaintiffs' horse representation is different than any horse representation used by the defendant. Plaintiffs and their predecessor have about seventy to eighty competitors in the industry, that is competitors in the sense that they were manufacturers of trailers of varying qualities, design and price. The plaintiff's products were wholesale priced from $1,995.00 to $2,600.00 and to $2,895.00. Only the aluminum trailers manufactured by two or three competitors were priced higher than plaintiff's trailers. Plaintiff's MUSTANG self-contained models (fully equipped) were wholesale priced at $2,395.00. Plaintiff's customers were primarily dealers numbering from one hundred to one hundred twenty-five, none of whom were franchised. Some of these dealers were also in the motor vehicle (truck and passenger automobile) sales business scattered in some states but primarily in the midwest. Plaintiff's potential future market appeared to be new of used car dealers of any make automobile. Plaintiff's product was and is available for use by the ultimate purchaser with any motor vehicle of any manufacturer and will continue to be the same in the potential future market. The plaintiff does not build motor vehicles and has no plans to do so. The plaintiff had plans to assemble

his constructed trailer unit onto a motored chassis purchased from any automobile manufacturer.

(C) Defendant's Products, Adoption and Use of the Trade-Mark

The defendant is a pioneer in the automotive industry in the manufacture and sale of truck and passenger vehicles. Its passenger vehicles are popularly known as Ford, Mercury and Lincoln. These models are further distinguished by secondary names of Thunderbird, Galaxie, Fairlane, Falcon, Mustang and Continental. Other competing manufacturers in the automotive industry follow the same general plan of the use of model names and secondary names. The defendant manufactures and sells chassis, trucks and passenger automobiles that are convertible for use in the trailer industry or by the ultimate user of a trailer of all kinds. The defendant does not manufacture or sell the trailer products of the industry to which plaintiffs are affiliated and defendant has no plans to do so. Some other members of the automotive industry have entered the trailer field in competition with plaintiffs. Defendant does not manufacture and sell the converting material necessary to make a trailer use of its automotive products but leaves such to the trailer industry and other industries. The trailer industry, including plaintiffs' business and their customers, is dependent upon the products of the automotive industry, including defendant's business, to provide mobility for the full use of the trailer by the user. Thus, there is a common market of users and dealers for the automotive and trailer industries. The defendant, as does the automotive industry, markets its products through independent franchised distributors and dealers throughout the United States who advertise and sell the new products of defendant and advertise and sell

the trade-in used products of all automotive manufacturers. The automotive dealers also buy, advertise and sell new and used trailers as well as other products.

The defendant, as do the other members of the automotive industry, advertises extensively its automotive products. The potential and present markets of the automotive industry are far greater than that of the trailer industry. Included in the advertising of defendant is the communication directed to the potential and present trailer owner of the adaption of its products to use in that field. Defendant has engaged in joint promotion with trailer manufacturers and at one time accepted the proposal of plaintiff's former sales manager for a joint promotion that was not consummated. Plaintiff's former president was a member of an awards committee of a trailer trade association and he personally approved of the committee's bestowal of an award to defendant for its outstanding advertising promotion beneficial to the trailer industry. The defendant does not manufacture, or sell, or advertise any unit of its products under the secondary name of MUSTANG depicting a horse which is convertible to the use of a trailer other than as a towing facility for the product of the trailer industry. The defendant, as do others in the automotive industry, provides a written warranty of its products, including its MUSTANG automobile, to the ultimate purchaser and user when the automobile is acquired from the dealer.

The massive advertising by the defendant and of its franchised distributors and dealers of defendant's products, including the MUSTANG automobile, together with the practice of the delivering of the written warranty to buyers clearly communicated at all times in question beyond any doubt to the public that the defendant was

the manufacturer, seller and warrantor of the MUSTANG automobile. The force of the massive advertising left no doubt in the public mind of the defendant's origination of the MUSTANG automobile even if the public was in the past or in the future became acquainted with the extensive history of prior use of the name MUSTANG accompanied by the representation of a horse by many other manufacturers with their many products. The public has never been, is not now, nor ever will or could be confused, or misled, or deceived by the defendant in the use of the name MUSTANG, accompanied by a representation of a horse, that any one other than the defendant was the originator, seller and warrantor of the MUSTANG automobile. There is no likelihood that the public has been, is now, ever will or could be confused over whether or not the plaintiffs were, or are the originators, sellers and warrantors of the MUSTANG automobile.

During the year 1962, the defendant manufactured an experimental economy sports vehicle which it named MUSTANG. It was not produced for sale but was displayed at vehicle shows. The plaintiff, on December 10, 1962, notified the defendant of defendant's use of its trade-mark which plaintiff had been using since September of 1960 with trailers and requested defendant, among other matters, to honor its trade-mark. The defendant acknowledged plaintiff's protesting letter and among other matters stated it was a premature accusation of invasion of rights as the use of the name was on a displayed vehicle which was not in production. In 1964, the defendant went into the mass production and sale of the vehicle with secondary name of MUSTANG accompanied by the representation of a horse. It is classed as a sports vehicle priced from the low $2,000.00 into the $3,000.00 price

depending upon the choice of the purchaser of extra equipment. The production and sale was accompanied by an immediate $6,000,000.00 advertising program and promotion program. Because of such programs, there was no doubt on the public's part as to whom originated the automobile from the time it was marketed. Since such initial production, another $10,000,000.00 has been expended by the defendant in advertising and promotion programs of its automobile and the secondary Ford name of MUSTANG accompanied by the representation of a horse. Because of such continued programs, there has been no change of mind on the public's part as to whom originated the automobile. After notifying the defendant, on April 9, 1965, of its claim of infringement, the plaintiff commenced this action on April 28, 1965.

While the name MUSTANG, as used by the defendant, is the same word as that used by the plaintiffs, it is presented and displayed differently than as used by the plaintiffs and while the representation of a horse alone or accompanied by the name MUSTANG as used by the defendant is different than the three used by the plaintiffs and is presented and displayed differently by the defendant than as used by the plaintiffs, the mark is substantially that as used by the plaintiffs and the many others who enjoyed prior use with many products.

LAW OF THE CASE

The plaintiffs' Indiana and common law trade-mark is limited to its use with the products of the trailer industry. Plaintiffs have no trade-mark rights thereunder so far as its use with the automotive industry products with which defendant is identified. The defendant is not a competitor of plaintiffs in the trailer business and defendant's use

of the name MUSTANG with the representation of a horse with its automotive products is not infringing plaintiffs' Indiana and common law mark as so limited to the trailer industry.

The plaintiffs' trade-mark is limited because it is not an original creation (coined or fanciful name) of plaintiffs as disclosed by the recited facts. It was limited to the secondary meaning acquired by plaintiffs' use and registered declared use thereof. The secondary meaning to the word MUSTANG and the representation of a horse therewith as used by plaintiffs was acquired in the trailer industry and market despite the many uses thereof by others as disclosed by the recited facts. Because of the nature of the Summary Judgment Proceeding in this posture of the case, the fact cannot be questioned that plaintiffs' mark had acquired such secondary meaning with small expenditures in promotion and advertising within the short time of approximately two years before defendant displayed its first use and approximately three years and four months before the defendant began to use the MUSTANG name and horse representation in production of automobiles which mark was old and shared by many others on a wide variety of products. The plaintiffs cannot extend their weak mark beyond the secondary meaning that it had acquired.

The defendant has avoided any claim of confusion of origin of its automotive product by immediately and continually informing the public that the MUSTANG automobile was a product of defendant. From the outset of the MUSTANG automobile's production it has acquired a secondary meaning in the automobile industry and in that market. There is no deception of the public or likelihood of public confusion, or the palming off of defend-

ant's product upon the good name, or service, or other attributes of plaintiffs' enterprise that it may have acquired. The public is informed that the MUSTANG automobile is a product of defendant.

Before reaching a decision on plaintiffs' claim of defendant's dilution of plaintiffs' property in the mark, there must be a fair appraisal of what was plaintiffs' property. The evidence discloses, when stripped of the adjectives of accusation culminating in a demand of $3,000,000.00 damages which tend to embellish the true status of plaintiffs' property before the alleged dilution, that plaintiffs' predecessor first used the public property of a dictionary word MUSTANG with a horse on a hand-made trailer in September 1960; when the name belonging to the public was chosen it was widely used as a mark in a variety of fields and many of which were Federal trade-mark registrations; the property value in the mark was developed, plaintiffs' claim, in a little over two years by furnishing the trailer market with 253 trailers using the mark, all but three of which were the smaller trailer campers (20 in 1960 grossing $31,467.00; 107 in 1961 grossing $176,069.00; and 126 in 1962 grossing $248,778.00); the property value plaintiffs claim in the mark was also developed in a little over two years by advertising and promotional expenditures of $28,400.69 ($2,899.33 in 1960; $11,256.91 in 1961; and $14,244.45 in 1962); by the end of 1962 plaintiffs' predecessor inequitably and ambitiously overclaimed its property interest in the mark not only in the trailer ind stry but also claimed it extended to the automotive industry products when the defendant first displayed its intended use of the name on its new sports automobile; thereafter the property value in the mark further developed plaintiffs' claim by furnishing the

trailer market with 326 trailers which used the mark (91 camper trailers and 79 travel trailers in 1963; and 11 camper trailers and 90 travel trailers in 1964); and during this same two year period the plaintiffs' predecessor was using various names identified with horses other than MUSTANG on 301 additional trailers which it furnished to the trailer market, the promotion cost of which is not disclosed; this further property value in the mark was developed by plaintiffs' claim of two years expenditures for advertising and promotion of $65,360.80 ($22,407.10 in 1963; and $42,953.70 in 1964). The defendant, in 1964, commenced the production and sale of the MUSTANG automobile with massive advertising and promotion thereof; the plaintiffs again inequitably and ambitiously overclaimed their property interest in the mark by requesting defendant to cease use of the name MUSTANG and the horse emblem and with renewed fervor they present their claims in this action. It is uncertain as to when the plaintiffs' mark matured from a dictionary publicly possessed name into distinctive property of plaintiffs. There is a difference of opinion as to whether the defendant has and is violating plaintiffs' rights, as charged in this action, between the former executives and stockholders and the present executives and stockholders of plaintiff corporation. Mr. Thomas M. Tuttle testified under oath as follows:

"Q. May I ask you, from what has been discussed earlier, did you give any consideration to the question of what, if any, value should be attached to the trademark of the word 'Mustang,' and the lawsuit that was pending for damages for an alleged infringement?

A. In regard to the lawsuit, we did not want any part of this lawsuit, not even 10 per cent. This

was the only arrangement that could be made out whereby we could acquire this company. We had to take it under a 'Chapter XI,' which, of course, is very expensive, and we are paying for this expense, and we didn't necessarily want to go this way, but Mr. Enochs' attorneys advised him that if the company was not a going concern, and coaches were not produced or made, that his lawsuit would be jeopardized. Therefore, it was worked out that he retain 90 per cent, and that the 10 per cent that we retain would be just an indication factor to the Court that the company was still operating. We couldn't care less about the suit that he has with the Ford Motor Company. We feel it is worthless, and we are in it to make trailers, and we are not in it to make some money on a lawsuit.

Q. Is that, then, your understanding of the reason for this Chapter XI proceeding, the reason being that it was the only way by which there could be a set off to Mr. Enochs, this right under this lawsuit?

A. That was my understanding, and that is the reason we are here under Chapter XI. We tried to buy it outright and form a different corporation. That was our original intention, and we had to go under Chapter XI. Our attorney advised us from the standpoint that we could eliminate any liabilities; if we didn't go under Chapter XI, we were going to form another corporation."

The foregoing are the factors, plus some blood, sweat and sacrifices of the former executive and principle stockholder, Mr. E. Edward Enochs, together with members of his family and a small, loyal group of employees, which are impossible even for them to describe, which developed the property right from a publicly possessed name MUS-

TANG with the trailer industry but in the midst of, surrounded by, or hedged in by many other users of the mark in other fields.

Faced with the inevitable conclusion of the limitation of the weak trade-mark under the facts of the case and the established fact that the defendant has educated the public of the defendant's origination of the MUSTANG automobile and thereby destroyed any claim of confusion as to such being plaintiffs' product, the plaintiffs ask the Court to apply the "dilution doctrine". Plaintiffs assert that because of the plaintiffs and defendant having a common market of trailer and automobile dealers and ultimate users the massive advertising of the defendant has diluted and whittled away the value of plaintiffs' mark. The plaintiffs assert that the defendant's advertising was so convincing that the ultimate purchaser believes plaintiffs' product is the defendant's, or that plaintiffs are affiliates of defendant, or that plaintiffs have unfairly taken defendant's name; also that plaintiffs while they may in some respects benefit from defendant's advertising they have also received the effects of all of defendant's past and future mistakes and reputation including the fact that defendant's MUSTANG is an economy automobile whereas plaintiffs' trailer is a prestige product; and also that the franchised dealers of competitors of defendant will no longer purchase plaintiffs' trailer, even though they are aware of the origin, because of their refusal to advertise the name MUSTANG and thereby bestow an unintended benefit to the competitive automobile of defendant. The plaintiffs further claim that since defendant's use of the mark it has been subject to embarrassing encroachment on the use of the mark by others in the trailer industry and litigation resulted with one

such alleged infringer. The plaintiffs say the "dilution doctrine" operates to protect the owner of a trade-mark against use of his mark by others on products of different descriptive properties, on the theory that the value of trade-marks, built up through extensive advertising and a good business reputation over a period of many years, would be gradually diminished by dilution, even though use of the mark by others could not lead to any confusion.

The State of Indiana, the situs of plaintiffs' business and in which the defendant is doing business, has no legislative dilution law and no common law precedent has been established by its courts. The United States Supreme Court has expressed no opinion on the doctrine. *Beech-Nut Packing Co. v. Lorillard Co.*, 273 U.S. 629, 47 S.Ct. 481, 71 L.Ed. 810. Five states, Illinois, Massachusetts, New York, Georgia and Connecticut, have adopted anti-dilution statutes. The State of Michigan, in which defendant has its principal manufacturing plant, has not legislatively adopted the anti-dilution doctrine but a United States District Court in Michigan in an opinion, without adopting the doctrine, observed that the doctrine has been sparingly applied. *Consolidated Cosmetics et al., v. Neilson Chemical Co.*, 109 F. Supp. 300, 310. Because of the pendency of plaintiffs' opposed application for a Federal trade-mark, it is also observed that Congress has not adopted an anti-dilution law. Absent a statute, is there a common law doctrine of dilution governing the rights and duties of these parties to each other? The defendant disputes this and urges that the dilution doctrine has not been accepted by the courts as unqualifiedly as the plaintiffs urge. *G. B. Kent & Sons v. P. Lorillard Co.*, 114 F. Supp. 621; *The Champion Paper & Fibre Company v. Nat'l. Assn. of Mutual Insurance Agents*, 249 F.2d 525. It is unnecessary for the Court to adopt the doctrine for the States

of Indiana or Michigan. Even if such common law doctrine was the law of the case, the facts of the case do not support plaintiffs' claim of violation of rights thereunder. The statutory provisions of states having the anti-dilution law and case law interpreting such laws exceed the common law doctrine of dilution. For example, the Illinois anti-dilution statute, Chapter 140, Section 22, Illinois Revised Statutes, which reads, so far as material with emphasis added:

> Every person * * * adopting and using a mark, * * * may proceed by suit, * * *, to enjoin subsequent use by another of the same or any similar mark, * * * if there exist a likelihood of injury to business reputation or of dilution of the distinctive quality of the mark, * * * notwithstanding the absence of competition between the parties *or of confusion as to the source of goods or services.*"

The common law doctrine does not go as far as the statutory created right and remedy. The authorities of the statutory states must be examined with care and compared with the common law principles before applying the case law of statutory states. The common law doctrine differs from the emphasized portion of the Illinois Statute and the doctrine which plaintiffs say is the common law. Judge Weinfeld pointed out some factors of the common law doctrine as applied in the case of *G. B. Kent & Sons v. P. Lorillard Co.*, 114 F.Supp., 621, 631:

> "Judge Learned Hand has referred to it as the economic interest which a senior user has in his mark outside the field of his own exploitation. While recognizing this right in the oft-quoted *Yale Electric Corp. v. Robertson* (26 F.2d 972, 974) it is significant that Judge Hand noted 'And so it has come to be recognized that, *unless* the borrower's use is so foreign to the owner's as to insure against any identifi-

> cation of the two, it is unlawful'. Thus, it appears that we come back to the point from which we started the element of likely confusion must be present. * * *.
>
> Analysis of the authorities, at least those in this circuit and in the New York State Courts, demonstrates that in each instance it was hinged to a factual situation which involved either likelihood of confusion, tarnishment, reasonable likelihood of expansion by plaintiff to include the junior product, diversion of trade or other directed injury."

The many cases cited by the parties (common law or statutory dilution doctrine) have been examined and no case extended the doctrine unless one or more of the following facts (none of which exists in the facts of this case) were established, (1) the plaintiff had a strong mark (an original, or coined, or unique name) which in the public mind had become associated solely with its products, such as "Kleenex", "Kodak", and "Polaroid"; (2) the plaintiff had such a celebrated name that defendant's use would immediately connect it in the public mind with plaintiff. The Stork Club case is a typical example, *Stork Restaurant, Inc. v. Sahati*, 166 F.2d 348; (3) a purchaser of defendant's products would think it emanated from the plaintiff because of the name; (4) likelihood of expansion of the plaintiff to include defendant's product; (5) diversion of plaintiff's trade to defendant; (6) tarnishment of plaintiff's good will; and (7) likelihood of confusion.

The evidence is that plaintiffs' mark is weak. It is not a celebrated mark, or original, or coined, or unique. It was in use by plaintiff for a short time before the defendant first used the mark on its display vehicle and its use ultimately in production and sale. Plaintiff's investment in advertising and promotion to develop it nationally was small. Plaintiff chose a mark that was much used

as the name of many products, including tractors, motorcycles, engines, trucks manufactured in England and Japan, automobile parts, cranes, clothing and other products. It had been registered in the United States Patent Office alone and in combination with the horse as a trade-mark at least thirty-four times for a variety of products. The common law does not extend the doctrine to the plaintiffs against the defendant or any of the prior users for such a saturated and already diluted trade-mark. The financial records of the plaintiffs, except for the period of construction and immediately after in expanding its plant to four times its former production capacity, is one of success. Sales increased after the accused dilution of plaintiffs' mark. Since its bankruptcy reorganization the plaintiff has continued the use of the mark MUSTANG and dropped the use of the other names.

When plaintiffs' predecessors chose and developed the weak mark, they accepted the weakness of the mark on the chance that others who were using the weak mark would dilute the mark as applied to plaintiffs' products by various means, including the conducting of a massive national advertising promotion of the other users' product so marked; and that some members of the public from such promotion would believe that plaintiffs' product is allied to the advertiser. Absent any other factor of unfair practice, plaintiffs would have no complaint for redress in law of such prior user smashing the market with his own product and mark. Plaintiffs have no right to the exclusive use of the mark under the facts of this case in all fields of products. Others, including the defendant, who enter the market place and adopt the weak mark for automotive products, or on products other than trailers, under the facts of this case, have the right to advertise

the product and mark the same as the plaintiffs and the prior users. Assuming the defendant was legally marked in the automotive field, then to support plaintiffs' dilution argument would be to say that it is unfair for the defendant to be so big financially as to be able to advertise and promote to such extent that it made a success of defendant's product in the automotive market which plaintiffs were unable to do financially in the trailer market before defendant, or that it was unfair for the defendant to advertise more than the plaintiffs and other prior users. The doctrine would hardly require a subsequent user, such as defendant, to limit its promotion to the plane of the plaintiffs and other prior users of the mark, if the subsequent user was legally marked absent any unfair practice. The law encourages industry to peddle its wares. There was no unfairness in the quantity of advertising by the defendant under the facts of this case. The defendant's competitive market is the adult public, or near adult, in the fifty states, who are financially able to acquire a motor vehicle. Advertising on a massive scale in the automotive industry must be undertaken to reach this market. The defendant simply vied for its just market in the manner and method and according to the custom and usage of the national automotive industry.

Under the facts of this case, it may be concluded in this posture of the case, by force of the non-disputed fact requirement of Rule 56 of the Federal Rules of Civil Procedure, that plaintiffs were likely to expand to a motorized trailer, but there is no likelihood of plaintiffs expanding to include the defendant's products under the facts of this case to support a claim under the doctrine of dilution.

Under the facts of this case, there was no diversion of plaintiffs' trade to the defendant to support a claim under the doctrine of dilution.

Under the facts of this case, there is no likelihood of tarnishment of plaintiffs' good will to support a claim under the doctrine of dilution. That good will tarnishment, of which the plaintiffs are offended, was within the bounds of what the plaintiffs could have expected had they appraised the past, present and future when chosing the weak mark, and the possibility and even probability that others, including subsequent users, would dilute this mark by massive advertising their own product.

Under the facts of this case, there is no likelihood of confusion of the origination of the plaintiffs' product to support a claim under the doctrine of dilution. That confusion of which the plaintiffs are offended was and is within the bounds of what the plaintiffs could expect the same as to their good will explained above. The prime buyers of the plaintiffs' products were the franchised dealers of the automotive industry together with dealers of trailers. Plaintiffs had no franchised dealers. Very few sales were made directly to the ultimate trailer user. The independent franchised automobile dealer of the various manufacturers of automobiles, and the trailer dealers, buy, sell, trade, advertise and promote the automobiles and trailers of all manufacturers. The franchised dealer, by contract, is committed to the contracted automobile product; nevertheless, to stay in the market place, he deals in other used automobiles and other products. The dealers and ultimate users, because of the high price range of automobiles and trailers, are discerning and informed buyers and there is no likelihood of their confusing plaintiffs' product as that of defendant and the confusion of

which plaintiffs complain in this regard is clearly within the bounds of what rights were acquired in their weak mark so mortgaged to the corresponding rights of others to the same mark used on products in another industry.

There being no genuine issue as to any material fact, under the issues of the three counts of plaintiffs' complaint and the answer thereto, and that plaintiffs have no claim thereunder based in law, the defendant is entitled to judgment as a matter of law.

IT IS ORDERED that the Clerk enter judgment in favor of the defendant and against the plaintiffs on each of three counts of the complaint with costs to be taxed in the manner provided by law.

Dated this 29 day of July, 1966.

/s/ Cale J. Holder
Cale J. Holder, Judge, United States District Court Southern District of Indiana

(IP 65-C-199)

DENIAL OF MOTION TO ALTER OR AMEND JUDGMENT OF JULY 29, 1966

Entry for October 5, 1966
Honorable Cale J. Holder, Judge

This cause came before the Court upon the plaintiff's motion to alter or amend the Judgment entered July 29, 1966, and the Court being duly advised in the premises now DENIES said motion.

(IP 65-C-199)

JUDGMENT ENTRY DENYING INTERVENTION

ENTRY

The above entitled action came before the Court for ruling on the plaintiffs' and petitioners' "Motion for Additional Parties, E. Edward Enochs, Bernice Enochs, And Buelah Vaught, To Be Added And/Or Intervene", which was filed August 29, 1966; the "Defendant's Brief In Opposition To Motion To Add Parties Plaintiff Or To Intervene", which was filed September 13, 1966; the plaintiffs' and proposed intervenors' "Motion To Allow Filing Of Pleadings By Intervenors" and memorandum, which was filed September 27, 1966; the brief entitled "Plaintiffs' And Intervenors' Reply Brief In Support Of Motion For Additional Parties E. Edward Enochs, Bernice Enochs, And Buelah Vaught To Be Added And/Or Intervene," which was filed September 27, 1966.

The plaintiffs and E. Edward Enochs, Bernice Enochs and Beulah Vaught are Ordered to make more specific within fifteen (15) days the allegations of items 2, 3, 4, 5, 6, 7 and 8 of their motion filed August 29, 1966 by stating the facts of each and providing copies of all pertinent written documents, and pertinent orders and proceedings of the United States District Court for the Northern District of Indiana in the pending bankruptcy of Westward Coach Manufacturing Company, Inc. in support thereof.

The plaintiffs and E. Edward Enochs, Bernice Enochs and Beulah Vaught are further ORDERED to file an appropriate pleading within fifteen (15) days to be tendered in support of the motion filed by them on September 27, 1966.

A final judgment was rendered for the defendant and against the two (2) plaintiffs in the captioned case on July 29, 1966. The action complains of tortious misconduct of infringement of trademarks and unfair competition on defendant's part after the incorporation of the plaintiff, Westward Coach Manufacturing Company, and its acquisition of an alleged common law and statutory trademark. These torts were against the plaintiff corporation and its successor administrator, the plaintiff, Trustee in Bankruptcy. The plaintiff corporation commenced this action in its name on April 28, 1965. It was disclosed at a pre-trial conference on April 6, 1966 that its officers had recently instituted, in behalf of the plaintiff corporation, a reorganization proceeding under Chapter XI of the Bankruptcy Act in the South Bend Division of the United States District Court for the Northern District of Indiana as Bankruptcy Cause Number 6191. Mr. Robert Spray, attorney for the plaintiff corporation, became aware, in the conference, that the action could not proceed with him as counsel without authority of the Trustee in Bankruptcy and possibly a substitution of the Trustee as the real party plaintiff for the plaintiff corporation and then only on authority of the United States District Court for the Northern District of Indiana. Thereafter, that Court authorized the Trustee to retain Mr. Spray as special counsel in the bankruptcy proceeding to conduct this action. On February 4, 1966, as authorized by that Court, Ray Grainger, Trustee of Westward Coach Manu-

facturing Company, Inc., petitioned to be added as a party plaintiff which was authorized by this Court in this action on February 8, 1966. Mr. Enochs chosen counsel, Mr. Spray, has continued to prosecute the action with continued uninterrupted aid from Mr. Enochs and the other petitioners and in the absence of some specificity as herein ordered the Court cannot on the alleged generalities reopen the presently pleaded issues of the complaint which have been settled by the judgment. It is difficult for the Court to ascertain from the facts of the case and the procedure followed prior to the judgment, within the knowledge of the Court, that the parties who now seek joinder and intervention should at this late date discover that they should have been or now should be parties to the action as pleaded.

The August 29, 1966 motion of the plaintiffs and E. Edward Enochs, Bernice Enochs and Beulah Vaught is DENIED on grounds 1, 9, 10, 11 and 12.

The September 27, 1966 motion of the plaintiffs and E. Edward Enochs, Bernice Enochs and Beulah Vaught is DENIED insofar as it is based upon grounds 1, 9, 10, 11 and 12 set forth in their August 29, 1966 motion and incorporated in their brief of September 27, 1966.

The facts before the Court resulting in the judgment of July 29, 1966 settling the pleaded issues in the captioned case disclose that Mr. E. Edward Enochs, individually, allegedly acquired and used the property right in the common law and statutory trademarks in issue in this action during the period from 1960 to September 21, 1962. They were wholly transferred from his individual proprietorship to the plaintiff corporation on September 21, 1962. The plaintiff corporation has remained in continuous ownership of the alleged trademarks since Sep-

tember 21, 1962 and its successor administrator in interest, the plaintiff, Trustee in Bankruptcy. Mr. Enochs was the principal stockholder, with the controlling interest, and the two (2) other petitioning intervenors were nominal stockholders. Mr. Enochs was the principal executive and driving force of the corporation and Mrs. Enochs participated actively in the affairs before the bankruptcy. The action makes no complaint of any tortious misconduct on defendant's part prior to the plaintiff corporation's acquisition of the alleged property right in the common law and statutory trademarks in issue and none are of record in the case. The plaintiff corporation commenced this action in its name on April 28, 1965. It was disclosed at a pretrial conference on April 6, 1966 that its officers had recently instituted, in behalf of the plaintiff corporation, a reorganization proceeding under Chapter XI of the Bankruptcy Act in the South Bend Division of the United States District Court for the Northern District of Indiana as Bankruptcy Cause Number 6191. Mr. Robert Spray, attorney for the plaintiff corporation, became aware, in the conference, that the action could not proceed with him as counsel without authority of the Trustee in Bankruptcy and possibly a substitution of the Trustee as the real party plaintiff for the plaintiff corporation and then only on authority of the United States District Court for the Northern District of Indiana. Thereafter, that Court authorized the Trustee to retain Mr. Spray as special counsel in the bankruptcy proceeding to conduct this action. On February 4, 1966, as authorized by that Court, Ray Grainger, Trustee of Westward Coach Manufacturing Company, Inc., petitioned to be added as a party plaintiff which was authorized by this Court in this action on February 8, 1966. Mr. Enochs chosen counsel, Mr. Spray, has continued to prosecute the action and

Mr. Enochs and his family have continued uninterrupted aid to counsel and the attempted injection of these new issues into the action after final judgment is prejudicial to the defendant and will only delay the ultimate conclusion. The claims asserted in grounds 1, 9, 10, 11 and 12 of the August 29, 1966 motion and reiterated in the September 27, 1966 motion and brief are at most indirect personal losses and wrongs suffered individually by the petitioners and are not actionable. To be actionable, such parties must have been the owners of the trademarks and operating the business when the alleged infringements and unfair competition of the defendant took place. The facts are as stated above that such petitioners were not such owners and operators when the alleged tort was committed but the unquestioned evidence is that the captioned plaintiffs were the owners of the trademarks and operators of the business. *Manz v. Philadelphia Brewing Co.*, (E.D. Penn. 1940) 37 F. Supp. 79, 81; *The Hertz Corporation v. Knickerbocker*, (S.D.N.Y. 1962) 206 F.Supp. 305; *Porter v. King County Medical Society*, (1936) 186 Wash. 410, 58 P.2d 367, 370; *Shubert v. Columbia Pictures Corporation*, (1947) 189 Misc. 734, 72 N.Y.S.2d 851, aff'd 274 App.Div. 571, 80 N.Y.S.2d 724, app. den. 274 App. Div. 880, 83 N.Y.S.2d 233; *Thos. Pipitone Inc. v. Pipitone Sales Corporation*, (1932) 235 App.Div. 502, 257 N.Y. Supp. 349, aff'd 261 N.Y. 584, 185 N.E. 748; *People of the Virgin Islands, et al. v. W. A. Taylor Co.*, (S.D.N.Y. 1951) 97 F.Supp. 737, 741-42. These claims do not qualify the petitioners as the real parties in interest in the issues adjudicated in the captioned action under the July 21, 1966 amended Rule 17 of the Federal Rules of Civil Procedure. The petitioners' individual claims, being unsupported in law, cannot be joined with the adjudicated issues

of the complaint in the captioned action under the July 21, 1966 amended Rules 17 and 20 and Rule 21 of the Federal Rules of Civil Procedure. The petitioners joinder as parties to assert these individual claims will not prevent complete relief between the parties to the caption case of the issues adjudicated, even if petitioners be assignees of damages from the captioned plaintiffs and become parties plaintiffs for such an interest, nor will their absence by reason of such individual claims impair or impede their ability to protect any interest in the issues of the adjudicated claims of the captioned parties, nor will their absence by reason of their not being parties to assert such individual claims leave any of the captioned parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of such individual claims; and, therefore, joinder is not authorized by the July 1, 1966 amended Rule 19(a) of the Federal Rules of Civil Procedure. The petitioners joinder as parties to assert these individual claims are untimely made; their intervention is not authorized by any statute of the United States; such new claims are not in issue in the adjudicated issues of the pleadings in the captioned action and consequently the judgment does not affect petitioners' claims nor are they adversely affected by the captioned plaintiffs, or their counsel's, Mr. Spray's representation; and such new claims of petitioners are not adversely affected by any distribution or disposition of property in the custody or subject to the control or disposition of a court or officer thereof and such new claims of petitioners are not claimed by the captioned plaintiffs in the adjudicated issues of the action; the issues of the captioned action having been adjudicated, the petitioners' new claims no longer have a common question of law or fact, if any there be, with the captioned parties and to reopen the issues only unduly

delay and prejudice the prompt termination of the litigation or the prosecution of the appeal from the final judgment; and, therefore, intervention of right is not authorized by the July 1, 1966 amended Rule 24(a) of the Federal Rules of Civil Procedure and permissive intervention is not authorized by Rule 24(b) of the Federal Rules of Civil Procedure. Such individual claims of petitioners were not transferred to them by the captioned plaintiffs, therefore, the petitioners cannot be substituted as parties plaintiffs for the captioned plaintiffs under Rule 25(c) of the Federal Rules of Civil Procedure.

Dated this 12 day of October, 1966.

/s/ Cale J. Holder
Cale J. Holder, Judge.
United States District Court
Southern District of Indiana

(IP 65-C-199)

DENIAL OF MOTION TO ALTER OR AMEND JUDGMENT OF OCTOBER 12, 1966

Entry for October 24, 1966

Honorable Cale J. Holder, Judge

This cause came before the Court upon the plaintiff's and Proposed Intervenors to Alter or Amend the Judgment entered October 12, 1966 and for extension of time and the Court being duly advised in the premises now DENIES the motion to alter or amend the Judgment entered October 12, 1966.

The Court GRANTS the motion for extension of time and the time is extended ten (10) days from the time set in the Judgment of October 12, 1966 to make more specific.

(IP 65-C-199)

DENIAL OF INTERVENTION

ENTRY

The above entitled action came before the Court for ruling on the plaintiffs' and petitioners' "Motion For Additional Parties, E. Edward Enochs, Bernice Enochs, and Beulah Vaught, To Be Added And/Or Intervene", which was filed August 29, 1966; the November 3, 1966 "Intervenors' Presentation As Ordered By Entry of October 12, 1966" and tendered amended complaint.

IT IS ADJUDGED, ORDERED AND DECREED that the Motion of the plaintiffs and the intervenors be and it is hereby DENIED and the tendered amended complaint be and is hereby stricken. The Court readopts the applicable findings in the Entry of October 12, 1966. The Motion and tendered complaint seeks to inject new issues which are not timely presented. The assignees of a portion of any recovery of the plaintiffs in this action are not assignees of the chose in action and have been prosecuting the action in the name of the assignors who possess the chose in action and the assignors also retain a partial

interest in any recovery and are fully protected in their assignment of damages by and through the assignors.

Dated this 7 day of December, 1966.

/s/ Cale J. Holder
Cale J. Holder, Judge,
United States District Court
Southern District of Indiana

JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IN THE

United States Court f Appeals

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1967—JANUARY SESSION, 1968

Nos. 16043 and 16071
WESTWARD COACH MANUFACTURING COMPANY, INC., and RAY GRAINGER, Trustee in Bankruptcy of Westward Coach Manufacturing Company, Inc.,
Plaintiffs-Appellants,
v.
FORD MOTOR COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis, Division.

January 9, 1968

Before HASTINGS, *Chief Judge,* and KILEY and CUMMINGS, *Circuit Judges.*

HASTINGS, *Chief Judge.* This is an action for trademark infringement and unfair competition brought by plaintiffs-appellants Westward Coach Manufacturing Company, Inc. and Ray Grainger, trustee in bankruptcy, against defendant-appellee Ford Motor Company on April 28, 1965, in the United States District Court for the Southern District of Indiana.

The three-count complaint charges Ford with infringement of Westward's common law trademark in the word MUSTANG with the representation of a charging horse; infringement of Westward's Indiana statutory trademark in the same word and representation; and unfair competition. The complaint seeks $3,000,000 in damages, punative damages and an injunction perpetually restraining Ford from using the mark MUSTANG and/or the representation of a charging horse in Indiana and throughout the world.

Upon the motion of Ford, and after a substantial record, including depositions, answers to interrogatories, affidavits, admissions of fact, and exhibits, was compiled, the district court entered summary judgment for Ford on July 29, 1966, pursuant to Rule 56(c), F.R.C.P., 28 U.S.C.A. Westward and Grainger appeal from that judgment.

Appellants E. Edward Enochs, Bernice Enochs and Buelah Vaught, all shareholders of Westward prior to its reorganization in bankruptcy (pursuant to Chapter XI of the Bankruptcy Act, 11 U.S.C.A.) and assignees of interests in this lawsuit, appeal from the judgment and from the district court's order of December 7, 1966,

denying their motion to intervene and striking their amended complaint.

Westward was incorporated in Indiana on September 21, 1962, as a successor to the unincorporated Westward Coach Manufacturing Company. The unincorporated Westward was founded by the appellant E. Edward Enochs in 1960 and began manufacturing pick-up campers (campers suitable for mounting on pick-up trucks) in September of that year. After incorporation Westward also began manufacturing travel trailers, designed for towing by a truck or automobile, and a few chassis-mounted campers for trucks.

The trailer industry is a large one. In 1965, a partial listing of manufacturers in the industry occupied seventy pages of a trade journal. The industry's sales of campers and trailers in the period of 1960-65 exceeded 875,000 units, of which Westward accounted for 1,234 sales.

Westward's products are sold principally through unfranchised dealers, some (approximately fifteen percent at the time this action was brought) of whom were also franchised dealers for new automobiles and trucks.

Westward marketed its trailers and campers under the names "Colt," "Palomino," "Pinto," "Stud," "Stallion," and MUSTANG. The MUSTANG name was first used in September, 1960, on campers and was subsequently used on travel trailers. Westward reserved the name for its highest quality products. Of the 1,234 campers and trailers sold by Westward in the period of 1960-65, 865 bore the MUSTANG name.

In January, 1962, Westward received an Indiana trademark registration on the MUSTANG name and repre-

sentation of a charging horse. The application stated that the mark would be used on "utility coaches, vehicle-carried accommodations for campers or travelers, vans, and the like."

Westward applied for federal registration of the mark on October 22, 1962. It overcame an opposition filed by White Motor Company and was issued a federal trademark on September 5, 1967. That trademark is for use on "utility van bodies mountable on pick-up trucks and small trucks for providing trailer-type housing and storage accommodations for travellers and sportsmen, coach bodies known as campers for providing such accommodation and mountable on an associated vehicle or carrying unit such as a truck or boat unit such as a pontoon frame, and trailers * * *." Westward's action is not founded on the federal trademark, and we may ignore it in this case.

Ford Motor Company is a leader in the automotive industry, manufacturing and marketing automobiles throughout the United States and in foreign countries. Consistent with industry practice, Ford markets its products through a nationwide system of independent franchised dealers.

In 1962, Ford built an experimental sports car which it exhibited at vehicle shows. The car, which was not initially produced for sale, was named MUSTANG and bore the representation of a running horse. Westward wrote Ford in December, 1962, notifying Ford that Westward had been using the MUSTANG name and horse representation since 1960, and requesting that Ford discontinue its use of the mark. In response, Ford expressed its opinion that Westward had no exclusive right to the MUSTANG trademark and that there was no likelihood

of confusion of Ford's products with Westward's products.

Ford began producing its MUSTANG sports car for sale in April, 1964. In addition to the MUSTANG name and the representation of a running horse, the car bore the name Ford. The introduction of the car was accompanied by a $6,000,000 advertising and promotion campaign, and an additional $10,000,000 was expended for advertising before October, 1965. In its advertising, Ford prominently displayed the Ford name, identifying the MUSTANG sports car as a Ford product and a member of "Ford's family of fine cars." In the first eighteen months of production, Ford sold 645,416 MUSTANG automobiles.

Ford has manufactured and marketed a Ford Econoline truck outfitted with living accommodations and referred to in Ford's advertising as a "camper." It has also advertised certain of its pick-up trucks as "Camper Specials." It has published an advertising booklet entitled "Ford Recreational Vehicles" and other publications promoting its products as recreational vehicles. It has engaged in joint promotions with trailer manufacturers. Ford does not manufacture or sell campers or travel trailers. However, some Ford dealers sell them in addition to Ford products.

Appellants allege that Westward has continuously and extensively used the name MUSTANG and representation of a charging horse in connection with its campers and trailers, and that through its extensive nationwide advertising and marketing effort the MUSTANG trademark had come to identify and distinguish its products. They allege that Westward's products and Ford's products are closely related and that Ford's use of the MUS-

TANG name and representation of a horse infringes Westward's trademark by creating a likelihood of confusion concerning the source of the products and by preventing Westward's expansion into the manufacture of self-propelled recreational vehicles. The allegations as to unfair competition are substantially the same.

At a pre-trial conference on January 6, 1966, it was disclosed that Westward had filed a reorganization proceeding in the United States District Court for the Northern Distfict of Indiana, pursuant to Chapter XI of the Bankruptcy Act, 11 U.S.C.A., and on February 8, 1966, appellant Grainger, the trustee in bankruptcy of Westward, was added as a plaintiff by order of the district court. The district court having jurisdiction of Westward's reorganization petition approved a plan assigning to the appellants E. Edward Enochs, Bernice Enochs, and Buelah Vaught an interest of approximately fifty percent in Westward's pending action against Ford, giving E. Edward Enochs the sole power to control the action, and charging him with the expenses of prosecuting the action. Five percent of the action was assigned to Westward, and the remainder to Westward's creditors, represented by the trustee, appellant Grainger.

The district court's order granting summary judgment to Ford was accompanied by an extensive memorandum opinion, which is reported at 258 F. Supp. 67 (1966). The court found no genuine dispute concerning the following facts. That the word MUSTANG is not a distinctive word, nor one originated by Westward or Ford, but is a noun of common usage denoting the wild or semi-wild horses introduced into North America by the Spanish conquistadores. That prior to Westward's or Ford's use of the name MUSTANG, it was used in connection with a

variety of products and had been federally registered as a trademark alone and in combination with the representation of a horse at least thirty-four times for a variety of products, including trailers. That there are at least 266 federal trademark registrations of a representation of a horse which are still in use. That Westward had used the trademark claimed by it continuously since September, 1960. That Westward's sales under the MUSTANG name totaled 579 units through 1964. That Westward's advertising and promotional expenditures, which were devoted principally to its MUSTANG campers and trailers, totaled $2,899.33 in 1960, $11,256.91 in 1961, $14,244.45 in 1962, $22,407.10 in 1963, and $42,953.70 in 1964. That Westward had no plans to build a motor vehicle, but did have plans to assemble trailer units on motorized chassis purchased from automobile manufacturers. And, that Ford's advertising and its warranty practices clearly communicated to the public beyond any doubt that Ford was the manufacturer, seller and warrantor of the MUSTANG automobile.

The court found as an undisputed fact that there is a common market of users and dealers for the automotive and trailer industries. It based this finding on these subfindings: that Ford's chassis, trucks and automobiles are convertible for use in the trailer industry or by the ultimate users of trailers. That some members of the automotive industry, *not including Ford,* have entered the trailer market in competition with Westward. That the trailer industry and trailer users are dependent for mobility upon the products of the automotive industry.

On the basis of these findings of undisputed fact, the court concluded that no genuine issue of material fact was presented and that Ford was entitled to judgment

as a matter of law. Specifically, the court's conclusions may be reduced to four.

First, the court held there is no likelihood of confusion concerning the origin of the MUSTANG automobile.

Second, it held that Westward's statutory and common law trademark is limited to products in the trailer industry. According to the court, since the name MUSTANG is not a coined or fanciful name, but a common noun, its application as a trademark is limited to the secondary meaning it acquired by Westward's use and registration of it.

Third, noting the common usage of the word MUSTANG, the short period of time between Westward's first use of the mark and Ford's first use of it, the small sum expended by Westward for advertising, the small production and sales of MUSTANG campers and trailers prior to Ford's use of the mark, the extensive prior and concurrent use of the mark on a wide variety of products and the extensive, prior registration of the mark for a variety of products, the court concluded Westward's mark was weak.

Finally, the court concluded that because Westward's mark was weak, it could not extend protection of the mark beyond the narrow limits of its secondary meaning in the trailer industry.

In the court's view there is no likelihood, considering the significance of an automobile or trailer purchase and the discerning character of dealers and users of automobiles and trailers, of their confusing the origins of Ford's and Westward's products. Whatever confusion might result concerning the origin of Westward's products is, the court felt, within the risk Westward took by choosing

and developing a weak trademark and is, for that reason, not actionable.

At the hearing on Ford's motion for summary judgment, on April 29, 1966, the parties Westward, Grainger, and Ford agreed that the motion presented substantive questions of law in the area of trademarks, tradenames and unfair competition. On oral argument before this court, counsel for appellants maintained that on the record there is likelihood of confusion as a matter of law, and that this court should so hold. Our review of the record discloses that the material facts are undisputed. The dispute on the merits is whether the type of confusion evidenced on the record constitutes trademark infringement or unfair competition. This is a question of law. On this record, the case is clearly an appropriate one for summary judgment. Rule 56(c), F.R.C.P., 28 U.S.C.A.

As a diversity case, state law is applicable on the issues of trademark infringement and unfair competition. *Pecheur Lozenge Co. v. National Candy Co.*, 315 U.S. 666 (1942); *Jewel Tea Co. v. Kraus*, 7 Cir., 187 F. 2d 278 (1950); *Addressograph-Multigraph Corp. v. American Expansion Bolt & Mfg. Co.*, 7 Cir., 124 F. 2d 706 (1941), cert. denied, 316 U.S. 682 (1942). Here, Indiana law is applicable.

The parties agree that the law of trademark infringement applicable to this case is identical with the applicable law of unfair competition. Trademark infringement is merely an aspect of unfair competition. Therefore, we may consider the common law trademark infringement and unfair competition issues together.

The Supreme and Appellate Courts of Indiana have held in a number of cases that the owner of a trademark

or tradename is entitled to protection against the adoption and use by a competitor of the same or a similar mark or name. *Smail v. Sanders*, 118 Ind. 105 (1889); *Keller v. B.F. Goodrich Co.*, 117 Ind. 556 (1888); *Minas Furniture Co. v. Edward C. Minas Co.*, 96 Ind. App. 520 (1929); *Jones v. Roshenberger*, 82 Ind. App. 97 (1924); *Hartzler v. Goshen Churn and Ladder Co.*, 55 Ind. App. 455 (1914); *Computing Cheese Cutter Co. v. Dunn*, 45 Ind. App. 20 (1909). The second user's adoption of the trademark or tradename in these cases suggested fraud. The second user's apparent purpose was to cause confusion concerning the source of *its product*, thereby capitalizing on the established reputation of the first user's product and diverting business from it.

In these and other cases the Indiana courts have formulated the rule that unfair competition is the attempt to create confusion concerning the source of the unfair competitor's goods. *Rader v. Derby*, 120 Ind. App. 202, 207 (1950); *Minas Furniture Co. v. Edward C. Minas Co.*, *supra* at 532-533; *Jones v. Roshenberger*, *supra* at 99-100; *Hartzler v. Goshen Churn and Ladder Co.*, *supra* at 464, 465-466; *Deister Concentrator Co. v. Deister Machine Co.*, 63 Ind. App. 412, 420 (1916); *Computing Cheese Cutter Co. v. Dunn*, *supra* at 23-24. A typical formulation of the rule is contained in *Hartzler*:

> "Unfair competition is always a question of fact. The question to be determined in every case is whether or not, as a matter of fact, the name or mark used by defendant has previously come to indicate and designate plaintiff's goods, or, to state it another way, whether defendant, as a matter of fact, is by his conduct passing off his goods as plaintiff's goods, or his business as plaintiff's business." *Hartzler v. Goshen Churn and Ladder Co.*, *supra* at 465-466, quoting 38 Cyc. 779.

The Indiana Trade-Mark Act, Ind. Ann. Stat. § 66-142 (Burns' 1961 Repl.), appears to adopt the same test for infringement of a state-registered trademark. It provides in part:

> "[A]ny person who shall
>
> (a) use, without the consent of the registrant, any reproduction, counterfeit, copy or colorable imitation of a trade-mark registered under this act [§§ 66-130 to 66-145] in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive as to the source or origin of such goods or services; * * * shall be liable to a civil action by the owner of such registered trademark * * *."

We are without the benefit of construction of this statute by the Indiana appellate courts.

The pleadings, depositions, answers to interrogatories, admissions of fact, and affidavits in this case clearly do not present a genuine factual question of confusion concerning the source of Ford's products. They reveal that Ford's MUSTANG was plainly identified as a Ford product in advertising and otherwise. Appellants produced no material admissible evidence of likelihood of confusion concerning the MUSTANG automobile.

Similarly, the pleadings, depositions, answers to interrogatories, admissions of fact, and affidavits do not raise a genuine issue of fact regarding likelihood of confusion about the source of Westward's products. Appellants produced slight evidence of actual confusion, and Ford apparently concedes the likelihood that Westward's MUSTANG-marked products will be mistaken for products of Ford.

Ford contends that under Indiana law and under federal law, if it is applicable, the second use of a trademark is not actionable if it merely creates a likelihood of confusion concerning the source of the first user's product. We are, therefore, called upon to decide whether, as a matter of Indiana law, the creation of such likelihood of confusion is actionable.

As we have indicated, the Indiana cases have involved the adoption and use of a mark or name identical with, or similar to, the established trademark or tradename of a competitor. The Indiana appellate courts have not considered whether a second use creating the likelihood of confusion about the source of *the first user's products* is actionable. The tests of unfair competition and trademark infringement formulated by the Indiana courts, as in *Hartzler*, do not embrace the latter type of confusion. Insofar as they appear to fix the boundaries of trademark infringement and unfair competition, they are mere dicta. Appellants apparently put forth a suggested doctrine of "reverse confusion" concerning which we find no rational basis for support.

We conclude that the summary judgment entered by the district court should be affirmed on the ground that the evidence shows without contradiction that appellants' trademark rights do not extend to use of the mark on automobiles.

As stated by the district court, the word MUSTANG is not a unique or novel word, or one coined by appellants. It is a common noun. Prior to Westward's adoption of the word for its campers and travel trailers, it had been used on aircraft, automobile mufflers, automobile springs, automobile and truck brake linings, farm tractors, motorcycles, rebuilt automobile engines, storage batteries, hand

trucks, truck engines, truck mountable cranes, and numerous other items. The name MUSTANG had been federally registered as a trademark thirty-four times, once for trailers and truck trailers. The latter registration was canceled, by reason of abandonment, as a necessary, preliminary step in Westward's proceeding for registration of its trademark.

The law protects a trademark only if it is, or has become, distinctive. 3 Callman, Unfair Competition and Trade-Marks § 69 (2d ed.).

> "In essence, the distinctiveness and popularity of the trade-mark will determine its relative strength or weakness and will accordingly define the scope of protection to be accorded the mark against the confusing similarity of others. A mark is strong if it is conspicuously distinctive; it is distinctive if the public has already been educated to accept it as the hallmark of a particular source. Then too, a mark can be distinctive either because it is unique, that is, distinctive in itself, because it has been the subject of wide and intensive advertisement, or because of a combination of both. It seems to follow as a necessary conclusion that the trade-mark has the advantage of strength where its owner has invested a considerable amount in advertising or can point to a long period of time during which his mark was used on a great quantity of articles, as symbolic of his business * * *. If the mark is weak, its protection may have an 'extremely narrow scope'; and may indeed be limited to similar goods similarly marketed. Only the strong mark will be protected against infringements arising out of its use in connection with noncompeting goods." 3 Callman, Unfair Competition and Trade-Marks § 82.1 at 1503-1504 (2d ed.). See also, *Sunbeam Lighting Co. v. Sunbeam Corp.*, 9 Cir., 183 F. 2d 969 (1950), cert. denied, 340 U. S. 920 (1951); *Philco Corp. v. F. & B. Mfg. Co.*, 7 Cir., 170 F. 2d 958 (1948), cert. denied, 336 U.S. 945 (1949).

Appellants allege in their complaint that the name MUSTANG with the representation of a horse had been continuously and extensively used by Westward to designate its campers and trailers and that it had come to identify and distinguish those products to industry distributors and the general public. Ford countered these allegations with a substantial amount of evidence, most of it in the form of admissions of fact under Rule 36(a), F.R.C.P., 28 U.S.C.A.

Appellants admit that the name MUSTANG had been extensively registered and used as a trademark on a variety of products, some of them in the automotive field, prior to Westward's adoption of the mark. They state, in answer to Ford's interrogatories, that by the end of 1962, the year Ford introduced the experimental MUSTANG sports car, Westward had sold 253 MUSTANG campers and trailers and spent $28,400.69 in nationwide advertising of its MUSTANG products. They further state, in answer to Ford's interrogatories, that by April 1, 1964, shortly before Ford introduced its MUSTANG in the market, Westward had sold a total of 479 of its MUSTANG units and that by the end of 1964 it had expended a total of $93,761.49 for advertising. Finally, they admit that prior to 1965 Westward purchased and used on its campers and trailers the horse emblem used by White Motor Company to identify its MUSTANG truck engines.

In the period of 1960-65 Westward's sales of MUSTANG campers and trailers were less than one-tenth of one percent of total industry sales. During the first fifty-two months of production, through 1964, Westward's sales of campers and trailers were spread throughout twenty-eight states and reached or exceeded fifty units in only

six states. In no state did its sales average as much as two units per month in this period.

The uncontradicted evidence introduced by Ford shows beyond controversy that Westward's MUSTANG mark was a weak mark. Ford's production of this evidence in support of its motion for summary judgment placed upon appellants the burden of raising a genuine issue of fact by producing evidence of their own. *Markwell v. General Tire and Rubber Co.*, 7 Cir., 367 F. 2d 748 (1966); *Bradford v. School District No. 20*, 4 Cir., 364 F. 2d 185 (1966); *Lundeen v. Cordner*, 8 Cir., 356 F. 2d 169 (1966). They could not rely on the mere allegations of their complaint to defeat summary judgment. *Ibid.*

Appellants did not carry the burden of raising a genuine issue concerning the strength of their mark. The district court correctly concluded that Westward's mark was a weak one.

The district court was also correct in its conclusion that Westward's trademark is limited to the trailer industry. It is undisputed that Westward's campers and trailers do not compete with Ford's MUSTANG sports cars. Nor was it likely that Westward's business would expend to include the manufacture of automobiles. Finally, while the products of the automotive industry are necessary to provide mobility for the products of the trailer industry, and while the marketing channels of the two industries overlap somewhat, we cannot say that campers and trailers and sports cars are "similar goods similarly marketed."

The pleadings, depositions, answers to interrogatories, and admissions of fact show that no genuine issue of material fact exists and that Ford was entitled to judgment as a matter of law.

There remains only the question whether the district court erred in denying the motion of appellants E. Edward and Bernice Enochs and Buelah Vaught to intervene.

Rule 24(a), F.R.C.P., 28 U.S.C.A, provides for intervention of right in certain cases if the application is timely filed. Here the application was filed sixteen months after the complaint was filed and *one month after summary judgment was granted.* Appellants seeking to intervene were intimately involved in the prosecution of this action from its inception. Under the circumstances, we find no error.

In sum, by virtue of the oral agreement of the parties, the trial court, in determining the question of summary judgment, was faced with a question of substantive law, absent any disputed question of material fact.

In our judgment, the record establishes that there is no likelihood of confusion of the origin of Ford's MUSTANG automobile; that Westward's trademark is limited to its use in the trailer industry; that Westward's mark is weak and its protection cannot be extended beyond the narrow limits of its established use.

The judgment of the district court is affirmed.

A true Copy:

Teste:

AFFIRMED.

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

DENIAL BY COURT OF APPEALS OF PETITION FOR REHEARING AND/OR CERTIFICATION OF QUESTIONS TO THE UNITED STATES SUPREME COURT

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

WEDNESDAY, FEBRUARY 7, 1968

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*

Nos. 16043 and 16071 WESTWARD COACH MFG. COMPANY, INC., RAY GRAINGER, Trustee in Bankruptcy of Westward, et al., *Plaintiffs-Appellants,* v. FORD MOTOR COMPANY, *Defendant-Appellee.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis, Division.

IT IS ORDERED by the Court that the petition for rehearing and/or certification of questions to the United States Supreme Court filed in the above entitled cause be and the same is hereby denied.

WESTWARDS FOREWARNING NOTICE LETTER TO FORD IN 1962

(Letterhead of)

ROBERT A. SPRAY
Attorney at Law

Post & 38th Professional Building
3675 N. Post Road, Suite No. 3
Indianapolis 26, Indiana

LIberty 7-9531

December 10, 1962

Office of the President
Ford Motor Company
Detroit, Michigan

Re: "Mustang" Trade-Mark of Westward Coach Manufacturing Company, Inc.

Gentlemen:

My client, Westward Coach Manufacturing Company, Inc., of Lafayette, Indiana, has become aware recently that Ford Motor Company has begun to use the mark "Mustang" for Ford vehicles.

For example, I refer to the November, 1962, issue of Popular Mechanics, page 93.

The trade-mark "Mustang" is a valuable property right of my client, who is using and has for an extended time used the trade-mark "Mustang" for utility coaches, often

referred to as "campers", which are mounted on and carried by a pick-up truck to provide vehicles with living and camping accommodations. The coaches of my client are of a high quality; and my client has spent considerable sums promoting the "Mustang" trade-mark.

We do not know that Ford has begun to use "Mustang" on this particular type of coach, nor even that Ford makes a camper coach of this nature; however, Ford does of course make various sorts of trucks and other vehicles and Ford has pictured various sorts of camper coaches in use with Ford trucks.

Accordingly, Ford's use of "Mustang" for vehicles, in the overall circumstances, seems quite likely to be a source of confusion of the public not only as to the source of my client's "Mustang" coaches, but the public would seem likely to think of "Mustang" coaches as a Ford accessory, and thus would direct inquiries concerning them to Ford instead of Westward.

Before you spent too much money in the promotion of the "Mustang" name for Ford, we call your attention to these factors, hoping that you will find it to your advantage to cease and desist using "Mustang" in the vehicle field; for your use in these circumstances is considered to be an infringement of Westward's trade-mark rights, and appears also to be legally-actionable unfair competition.

If forced to litigation, Westward will seek not only an injunction, but also substantial monetary damages, particularly considering the fact that Ford has illustrated camper coaches with Ford vehicles.

For the sake of immediateness of results, it may be that Westward may waive enforcement of the presently-

existing infringement, if a suitable settlement can be arranged. Your compliance, by both a mutally-acceptable settlement and Ford's withdrawal from use of the trade-mark "Mustang", by both Ford and its distributors, will thus absolve Ford from further liability for the present infringement.

If, alternatively, Ford desires to continue to use the "Mustang" trade-mark, Ford's substantial and continuing liability for both trade-mark infringement and unfair competition could be avoided by only a quite substantial settlement to compensate for my client's losses occasioned thereby.

My client, who has spent and is spending considerable sums of money in promoting good-will in the "Mustang" mark for its coach, is quite naturally desirous of an early resolution of this matter. I should think that Ford also should be quite desirous of an early resolution, avoiding controversy and litigation, and of avoiding the further expenditure of promotional funds with respect to a trade-mark of another, trade-mark rights both by common-law and by registration.

Accordingly, may I have your early reply, say no later than December 28, 1962.

Sincerely,

/s/ Robert A. Spray
Robert A. Spray, Attorney

RAS:fw

cc: Westward Coach Mfg. Co., Inc.
Office of the President

FORD'S RESPONSE LETTER IN 1962

(Letterhead of)

FORD MOTOR COMPANY

Wright Tisdale
Vice President and General Counsel

The American Road
Dearborn, Michigan

December 19, 1962

Robert A. Spray, Esq.
Post & 38th Professional Building
3675 N. Post Road, Suite No. 3
Indianapolis 26, Indiana

Dear Sir:

Mr. Dykstra has referred to me your letter dated December 10, 1962, addressed to the Office of the President of Ford Motor Company, concerning our use of the name "Mustang" to identify one of our display cars.

We cannot agree that our use of the name "Mustang" to identify one of our display cars in any way infringes upon the rights of your clients. The name "Mustang" has been used by a number of manufacturers for many years to identify a variety of products adapted for use on vehicles. Several of these products are of the same type as those that you state are manufactured by your client. We are not aware of any instance of confusion between those products and the products of our Company, nor do we believe that there is any likelihood that

they, or the products of your client, would be confused with our products.

It is our practice to insist upon our legal rights in trademarks, and to respect the legal rights of others in their trademarks. After careful consideration, we have concluded that your client does not have any exclusive right to the use of the name "Mustang" for vehicles that is infringed by our use of the name to identify a display car. I feel confident that upon further consideration you will agree with our view.

Sincerely yours,

WT:br

STATUTES

15 U.S.C. 1114: Remedies; Infringement; Innocent Infringement by Printers and Publishers

(1) Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive [An amendment in 1962 deleted at this point the following additional words: "purchasers as to the source of origin of such goods or services"]; or

(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels • • • intended to be used in commerce upon or in connec-

tion with the sale * * * or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.

shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) of this section, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive * * * July 5, 1946, c.540, Title VI., Sec. 32, 60 Stat. 437; Oct. 9, 1962, Pub.L. 87-772, Sec 17, 76 Stat. 773.

INDIANA TRADEMARK STATUTE

(Relevant portions only)

66-142. Improper use of registered mark or imitation—Damages.—Subject to the provisions of section 15 [§ 66-144] hereof any person who shall

(a) use, without the consent of the registrant, any reproduction, counterfeit, copy or colorable imitation of a trade-mark registered under this act [§§ 66-130—66-145] in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive as to the source or origin of such goods or services; or

(b) reproduce, counterfeit, copy or colorably imitate any such trade-mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used upon or in conjunction with the sale or other distribution in this state of

such goods or services shall be liable to a civil action by the owner of such registered trade-mark for any or all of the remedies provided in section 14 [§ 66-143], except that under subsection (b) hereof the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such trade-mark is intended to be used to cause confusion or mistake or to deceive. [Acts 1955, ch. 174, § 13, p. 449; 1959, ch. 256, § 6, p. 599.]

66-143. Enjoining manufacture, display or sale of counterfeits or imitations—Damages.—Any owner of a trade-mark registered under this act [§§ 66-130—66-145] may proceed by suit to enjoin the manufacture, use, display or sale of any counterfeits or imitations thereof and any court of competent jurisdiction may grant injunctions to restrain such manufacture, use, display or sale as may be by the said court deemed just and reasonable, and may require the defendant to pay such owner all profits derived from and/or all damages suffered by reason of such wrongful manufacture, use, display or sale; and such court may also order that any such counterfeits or imitations in the possession or under the control of any defendant in such case, be delivered to an officer of the court, or to the complainant, to be destroyed.

The enumeration of any right or remedy herein shall not affect a registrant's right to prosecute under any penal law of this state. [Acts 1955, ch. 174, § 14, p. 449.]

66-144. Common-law rights unaffected.—Nothing herein shall adversely affect the rights or the enforcement of rights in trade-marks acquired in good faith at any time at common law. [Acts 1955, ch. 174, § 15, p. 449.]

AFFIDAVITS OF RECORD

LETTER (Verified)
by E. S. Barker, a Trailer Dealer

(Letterhead of)

TRAILER VILLAGE SALES, INC.

U.S. #1 — Kittery, Maine

Kittery, Maine
April 29, 1966

"Area Code 207
439-0545
Robert A. Spray
Attorney At Law
3675 N. Post Rd.
Indianapolis, Indiana

Dear Sir:

"In answer to your inquiry about the confusion created by the use of the name Mustang by Westward Coach Co. of Elkhart, Indiana and also the Ford Motor Co. I have found that there is a lot of confusion. As Ford now is going into the recreational vehicle business, a lot of people think that a Mustang Car and a Mustang travel trailer are both made by Ford Motor Co. Westward Coach has always built a quality travel trailer in the best class, and they are expensive. Ford Motor Co. has recently come out with the Mustang car which is a low priced model of sports car and in my opinion not in the good class of their other products.

"I have had many people say to me that they did not want to buy a Mustang travel trailer because they confused it with the Mustang car and thought that both were made

by FORD, and were low priced competative units. I have had to explain many times that Westward Coach has been using the name Mustang since 1960 and have been building a quality travel trailer since then, and that FORD MOTOR CO. has recently come out with the MUSTANG sports car and are using the same name and that a lawsuit is in progress.

"Also my competition is capitalizing on this situation, as they will tell a customer that they are both made by FORD. I have to point out to the customer the name plate saying that the travel trailer was made by Westward Coach Co. Then I get a rebuttal from the customer that they have been told that WESTWARD Coach Co. is a subsidery of FORD MOTOR CO. I try to explain that they have no connection, some people will believe me and others will have their doubts because of the same name.

"In closing I would like to state that I believe that the use of the same name by both compan's is very confusing, and that Westward Coach Co. was using the name MUSTANG long before FORD MOTOR CO. to the best of my knowlege and they should be entitled to continue to use it.

Yours truly

/s/ E. S. Barker, President
Trailer Village Sales, Inc.
Kittery, Maine

"Sworn and Suscribed to before me this 29th day of April 1966 in the county of Rockingham in the State of New Hampshire.

/s/ Irene R. Lelul
Notary Public
My commission expires Sept. 19, 1968"

ABSTRACT OF AFFIDAVIT

of Spencer Galbreath, a Trailer Dealer

"5. While handling Westward's Mustang trailers, I experienced from practically every customer and shopper nothing but confusion, relating to the Ford "Mustang" and Ford. Shoppers continually would ask me if the Mustang was a Ford product, and I would say, "No, it's a Westward product." They would say, "Well, maybe Ford doesn't want it to be known that they own the company, but we know that Westward wouldn't be using the name if Ford wasn't connected or standing behind it." This was the substance of many occasions.

"6. The supposed Ford-affiliation of Westward's Mustang was so strong that the people, who inquired about some sort of Ford affiliation, were very hard to convince that Westward's Mustangs were not owned or affiliated with Ford, even by telling each inquirer the non-Ford affiliation one or two times, so I would not then argue further with the inquirer or try further to correct him, for I am not in the business of trying to un-confuse the public after telling them the truth, on a matter about which they express so definitely their own assumption. It was hard for me as a salesman; for although many still seemed unconvinced and skeptical of my comments and thus no doubt of me also, I knew I could not argue too much yet still keep the customer or shopper on a friendly basis."

ABSTRACT OF AFFIDAVIT

of Costa Markos, a Trailer Dealer

"[There] has been quite a bit of confusion over the name "Mustang." I would guess that about one fourth

of the prospective buyers asked me if Mustang travel trailers were owned by Ford Motor Co. * * * In my opinion the situation is getting worse with time."

ABSTRACT OF AFFIDAVIT

of J. Harold Daniels, a Trailer Dealer

"In general, I would say without hesitation that every week I have several remarks relating Mustang travel trailers with Mustang automobiles and Ford."

ABSTRACT OF AFFIDAVIT

of James E. Lyboldt, a Chevrolet Dealer who sold Campers also.

"That was the end of my advertising the Mustang camper. I had no desire to advertise for the Ford Motor Company."

ABSTRACT OF AFFIDAVIT

of Howard Johnson, a Trailer Dealer

"6. I have heard comments from several people in the Kokomo area to the effect that they would not buy a Westward "Mustang" because they feel that Ford would soon put Westward out of business."

ABSTRACT OF AFFIDAVIT

of Ivo Heckaman, President of a Competitive Manufacturer which makes "Phoenix" Trailers

"2. Westward's said "Mustang" products were very good, like a Cadillac automobile in reputation. * * *

"6. In view of Westward's advertising and promotions, and exhibits at shows, of its trademark "Mustang" for its

recreational vehicles of various types, the trademark "Mustang" was accepted by the trade and the public as identifying recreational vehicle products (including campers and travel trailers) of a single source or manufacturer, prior to the spring of 1964 and for many months prior thereto; and that manufacturer was Westward Coach Manufacturing Company.

"7. In view of Westward's advertising and promotions, and exhibits at shows, of its trademark "Mustang" for its campers of various types, the trademark "Mustang" was accepted by the trade and the public as identifying various styles of campers of a single source as long ago as early 1962; and that manufacturer was Westward Coach Manufacturing Company."

ABSTRACT OF AFFIDAVIT

by James H. Baker, Sales Manager of Chevrolet Dealer

"4. I would not want this Chevrolet dealership to handle or promote recreational vehicles with the trademark "Mustang," because of the many factors of close relationship of recreational vehicles to the automotive industry, and because I feel that "Mustang" is now a Ford name in this overall field for reasons including the overwhelming promotion by Ford of the name "Mustang" for its product and the extreme closeness of the fields; thus I would be promoting my competitor Ford. This is my reaction regardless of the quality of a Mustang recreational vehicle, and my reluctance is even stronger according to the quality of the Mustang recreational vehicle."

ABSTRACT OF AFFIDAVIT

by Ebert D. (Rex) Cox, Jr., an Executive in Recreational Vehicle Trade Assn.

"4. These Westward "Mustangs" were of very high quality of the prestige and luxury class, very attractive products. * * *

"13. Westward's "Mustangs" were becoming increasingly accepted, for reasons as mentioned above, even though Westward's "Mustang" was just getting started and beginning to grow in the years 1960 and 1961 which were years of slight slump in the industry, the survival of and the increasing acceptance of Westward's "Mustangs" in those slump years of the industry particularly indicating their commercial appeal and business prospects. * * *

"21. The recreational vehicle industry, including truck campers and travel trailers, has been growing at a fantastically good rate, after a slight slump in 1960 and 1961, and has fantastically good business prospects for the foreseeable future. Companies, other than Westward, who are at all comparable to Westward with respect to experience, reputation, capacity, and quality, price, advertising and other product factors are doing very good business at present and throughout 1964 and 1965; and they generally correspond to the continuing growth indicated herein for the industry as a whole."

ABSTRACT OF AFFIDAVIT "F"

by E. Edward Enochs

"5. Ford in 1966, in its advertising booklet, "Mustang! 1966 Mustang! Mustang!" (Exhibit M) advertises it for pulling trailers, and provides a special cooling package if desired for trailer-pulling service. The booklet's rear

cover states "Own a trailer? Planning to buy one? Your Ford dealer can help you equip your new Mustang for many of the popular sizes. The Mustang optional equipment suggestions listed here can add a great deal to smooth-sailing trailer trips with your Mustang." There is no hint of limiting the use to pulling boat trailers."

ABSTRACT OF AFFIDAVIT "G"

by E. Edward Enochs

"1. The expression "recreational vehicle" has been coming into a general and wide use since about 1963 or 1964 to include various types of pick-up campers, chassis mounts, soft-top tent trailers (fold up), travel trailers, and motorized units, car campers, and others useful for recreational living or camping purposes providing living accommodations. The expression is found now commonly in most all magazines relating to the trailering and camper interests, and in other references, and is illustrated by the page 121 attached (as Exhibit A) from *Mobile Home/Travel Trailer Dealer*, April 20, 1966, which illustrates many types from a tent camper to a motorized home.

"2. Ford itself uses the same term "recreational vehicles" for *Ford's own products.* For example:

a. In 1964 Ford published an advertising booklet entitled "Ford Recreational Vehicles." (Exhibit B attached) The term is used on at least the front and back covers, and on the inside front cover wherein, in speaking of the Ford fleet it is said, "We call them the Ford Recreational Vehicles." In the *same* booklet, page 6, Ford uses the *same* term "recreational vehicle" in obvious reference to the various types of living-quarter products.

"b. Ford's vice-president, Donald N. Frey, is quoted as speaking of "'Ford's wide range of recreational vehicles" in *Mobile Home/Travel Trailer Dealer* (a trade publication) April 20, 1966, page 126.

c. Ford's ad in the *Indianapolis Star,* (March 25, 1966, page 26) (Exhibit C attached) uses the text "Ford The Leader in Recreation Vehicles."

"3. As illustrated in the above, both Westward's "Mustang" products, and Ford products, are known by the same specialized term "recreational vehicles" in referring to their products."

ABSTRACT OF AFFIDAVIT "N"

by E. Edward Enochs

"2. My [Westward "Mustang"] products were given a *5-star* (the highest) quality certified rating by Mobile Home Journal, a national trade magazine."

ABSTRACT OF AFFIDAVIT "S"

by E. Edward Enochs

1. Ford has been a strong leader in promoting the recreational vehicle industry. Ford itself held a large camper and trailer show and demonstration in 1963 at which Westward and its "Mustangs" were present.

2. Ford's promotion of the recreational vehicle field earned Ford several awards such as that in 1964 of Camper Coachman Magazine.

3. Ford promotes competitors of Westward, such as Sears & Roebuck, by joint promotions and by itself or its dealers as they promote specific recreational vehicle companies such as Trail Haven and Gold-Line.

4. Ford's activity in the recreational vehicle industry has been so strong that Mobile Home Journal's forthcoming June, 1966, (already distributed) tells of a rumor that Ford has purchased a large trailer firm. Whether the rumor is true is not known to me, but the fact of the rumor is well known.

5. Ford officials have indicated that Ford would not actually go into the business until volume got much larger; but, the joint promotions of Ford and its dealers make it in the recreational vehicle business already.

ABSTRACT OF FRANK RIZZO DEPOSITION

Taken on July 22, 1965

Frank Rizzo, Sales Manager of Westward Coach Manufacturing, Inc. since August, 1964, testified as follows: (Numbers in parenthesis deposition transcript pages)

Car dealers whose business nature makes them desirable as joint dealers in recreational vehicles (10), are becoming increasingly involved in the recreational vehicle field (7, 15). About 15% of Westward's dealers are car dealers (7).

Even though the car dealers like Westward's "Mustang" (9), and automobile dealers are continuously solicited (14) in a strong and repetitive manner (10), Westward could not obtain non-Ford automobile dealers to handle Westward's "Mustang" units because of the Ford "Mustang" name-confusion (8, 9, 11, 12, 14, 15).

The quality of Westward's "Mustang" is the highest (20, 21), but Westward's reputation has been hurt by the supposition it is Ford-affiliated (37). People would ask Westward if it is a Ford affiliate (34) and express the thought that Westward's "Mustang" might be built as cheap as the "Mustang" automobile (37).

Westward's sales were not as much as expected in 1964 and 1965 (38, 42, 55), but could have been a couple of million dollars (56).

Westward made plans in October, 1964 to expand into motorized homes (58, 59, 60) as other recreational vehicle manufacturers had (60). Motorized units would come within the general framework of Westward's distribution (60, 61).

Automotive manufacturers including Ford, Chevrolet and Dodge are affiliated with motorized homes (60, 62, 63).

ABSTRACT OF E. EDWARD ENOCHS

DEPOSITION, Taken on July 22 and July 23, 1965

In 1963, Westward turned away about four times its business because it lacked production capacity (69, 253), and therefore plans to quadruple its capacity in 1963, before Ford's entry, were completed in 1964 (69, 75, 253, 254) and put into use. Capacity with the new facilities of 1964 was about 15 to 20 per cent (77), while only 7 to 12 per week in 1963 (82). Sales in 1965 of about $500,000.00 should have been at least $2,000,000.00 (69, 70).

ABSTRACT OF AFFIDAVIT "E"

by E. Edward Enochs

Mr. Enochs, with supporting exhibits, refers to and shows several Ford publications published as early as the first part of 1964 in which recreational vehicles are prominently displayed.

ABSTRACT OF AFFIDAVIT "I"

by E. Edward Enochs

Mr. Enochs states that Westward considered as early as 1961 future expansion into motorized recreational vehicles and even contacted a concern that produced chassis in 1963; sold chassis mounted campers as early as 1962; and felt that Ford's use of "Mustang" on automobiles blocked expansion into motorized recreational vehicles.

ABSTRACT OF AFFIDAVIT "J"

by E. Edward Enochs

Mr. Enochs states that sales grew from $31,000.00 in 1960 to several hundred thousand dollars per year; that many orders were turned away in 1963 because of insufficient capacity precipitating the decision to increase capacity by ordering two new buildings that were completed in 1964.

ABSTRACT OF AFFIDAVIT "K"

by E. Edward Enochs

Mr. Enochs identifies over fifty separate advertisements of Westward's products placed by Westward in newspapers and nationally-distributed magazines in the years 1960 to 1965.

ABSTRACT OF AFFIDAVIT "L"

by E. Edward Enochs

Mr. Enochs states that he tried to keep the lack of expected sales in 1964 a close secret; felt Ford's use of "Mustang" was irrevocably hurting Westward; Westward's "Mustang" enjoyed a high reputation as a quality

product at a quality price; Westward took money-losing steps in 1964 and 1965 in an effort to bolster sales in producing low-profit other than "Mustang" type units and loading down "Mustang" units with extra features and accessories without a corresponding price increase; and prior to Ford's adoption of "Mustang" in early 1964, there had not been too significant a view that Westward's prices were too high for its quality product.

ABSTRACT OF AFFIDAVIT "M"

by E. Edward Enochs

Mr. Enochs states that Westward's promotion, through the years of "Mustang" had stressed the relation of its products to the cowboy West; "Mustang" was suggestive of rugged construction, sturdiness, strength, the feeling of exciting promise, on-the-go nature, and adventure; and "Mustang" had high appeal for Westward's recreational vehicles.

ABSTRACT OF AFFIDAVIT "Q"

by E. Edward Enochs

Mr. Enochs states that the term "camper" is jointly used by the recreational vehicle industry and the automotive industry; Ford's Econoline living-quarter van is referred to as a camper; and Ford calls its pick-up truck a "Camper Special".

ABSTRACT OF AFFIDAVIT "P"

by E. Edward Enochs

Mr. Enochs stresses that the public has strong likes and dislikes for products of automotive manufacturers; Ford has a bad reputation with many people as evidenced

by published articles on the "Edsel" and other published articles and public expressions; and the recent car-safety inquiry increases the risk from a reputation standpoint of a related product using a brand name that is the same as that of an automotive manufacturer.

ABSTRACT OF AFFIDAVIT "Q"

by E. Edward Enochs

Mr. Enochs states, with supporting exhibits, that "Mustang" was listed as Westward's in the 1961, 1962 and 1963 "Manufacturer's Brand Names" listing by Mobile Home Dealer, a national trade magazine; several infringements of Westward's "Mustang" trademark, all apparently starting subsequent to Ford's 1964 entry of its "Mustang" automobile, were short-lived after being pursued by Westward, although one infringer said it did because of Ford's activities and another did in an apparent joint promotion with Ford.

ABSTRACT OF AFFIDAVIT "R"

by E. Edward Enochs

Mr. Enochs states, with supporting exhibits, that since 1961 there has been an increasing acceptance of motor homes and increasing mention of automotive manufacturers, including Ford, in the recreational vehicle field; Westward's "Mustang" campers have been advertised in national publications side-by-side with motor homes of various manufacturers; motor homes are sold under both the trademarks of automotive manufacturers and recreational vehicle manufacturers; and Ford dealers sell the "Condor" and the "Econoline" fitted with living quarters placing them in the motor home classification.

ABSTRACT OF AFFIDAVIT "T"

by E. Edward Enochs

Mr. Enochs states, with supporting exhibits, that in 1963, Ford, Dodge and Chevrolet motors homes and Westward's "Mustang" camper appeared on the same page of a nationally distributed magazine; and in an advertisement of Ford's "Camper Special Pickup", a camper body is mounted thereon.

ABSTRACT OF AFFIDAVIT "U"

by E. Edward Enochs

Mr. Enochs states, with supporting exhibits, that Ford and other automotive manufacturers have been mentioned in articles, ads and displays published in recreational vehicle magazines, many such articles, ads and displays illustrating an automotive or truck vehicle in association with a recreational vehicle.

ABSTRACT OF AFFIDAVIT "V"

by E. Edward Enochs

Mr. Enochs states, with supporting exhibits, that many non-Ford automotive companies provide literature and advertising relating to recreational vehicles.

ABSTRACT OF AFFIDAVIT "W"

by E. Edward Enochs

Mr. Enochs states, with supporting exhibits, that there are innumerable diversification and varieties of types and styles of recreational vehicles, including both car-top and chassis mount campers.

UNITED STATES CONSTITUTIONAL PROVISIONS

ART. 1, SECTION 8 "The Congress shall have power . . . [clause 3] To regulate Commerce . . . among the several States. . . ."

FIFTH AMENDMENT

. . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . .

FOURTEENTH AMENDMENT

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56(c) . . . The judgment sought shall be rendered if . . . there is no genuine issue as to any material fact. . . . .

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 31 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1406

WESTWARD COACH MANUFACTURING COMPANY, INC., AND RAY GRAINGER, TRUSTEE IN BANKRUPTCY OF WESTWARD COACH MANUFACTURING COMPANY, INC.,
Petitioners,

vs.

FORD MOTOR COMPANY,
Respondent.

APPENDIX OF RESPONDENT.

HARRY T. ICE,
JAMES E. HAWES, JR.,
10th Floor, 111 Monument Circle,
Indianapolis, Indiana 46204,
JOHN R. SPIELMAN,
Ford Motor Company,
American Road,
Dearborn, Michigan 48121,
Attorneys for Respondent.

Of Counsel:
ICE MILLER DONADIO & RYAN,
10th Floor, 111 Monument Circle,
Indianapolis, Indiana 46204.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1406

WESTWARD COACH MANUFACTURING COMPANY, INC., AND RAY GRAINGER, TRUSTEE IN BANKRUPTCY OF WESTWARD COACH MANUFACTURING COMPANY, INC.,
Petitioners,

vs.

FORD MOTOR COMPANY,
Respondent.

APPENDIX OF RESPONDENT.

The material herein was omitted from Petitioners' Appendix. It should have been presented so that all of the pertinent facts would be before the Court.

The material from the "affidavits" of Messrs. Barker, Galbreath, Markos, Daniels, Lybolt, Johnson, Heckaman and Baker set forth in Petitioners' Appendix pages 74-79, were really answers to an inquiry of the attorney for the Petitioners.

ABSTRACT OF ROBERT A. SPRAY AFFIDAVIT "B",

Robert Spray was the attorney for the Plaintiffs-Appellants in the trial court and this affidavit was made at the suggestion of the Defendant-Appellee to explain the source of the fifteen dealer affidavits he had submitted in opposition to the Motion for Summary Judgment.

In April, 1966, he sent an inquiry to a total of 133 dealers. (This was characterized by Judge Holder as "a most biased presentation of the case," as a "lopsided request" which produced a "minimal" return which was "wholly immaterial" to the issues of the case. Entry of July 13, 1966, R. 475.) In addition to the transmittal letter, he sent to each of those persons a document entitled "Explanation of This Inquiry" (Exhibit G to affidavit), and an additional letter of instructions (Exhibit H to affidavit), which were as follows:

Exhibit G.

Explanation of This Inquiry.

This inquiry relates merely to the use of the name "Mustang," and to factors of confusion regarding "Mustang" trailers and campers since Ford has begun to use the same name for its cars.

Since *1960,* Westward Coach and Manufacturing Company has used the name "Mustang" for its campers and trailers. About *1962,* Ford used the name "Mustang" for a display car; and in *1964,* Ford began national distribution of its "Mustang" automobile, even though back in 1962 Westward wrote Ford to ask that Ford not use the name.

(In a belittling reply, in 1962, a Ford vice-president wrote Westward to assert that Ford's use would not create any

likelihood of confusion of Westward's and Ford's products, intimating that Ford's use would be for only a "display car" rather than a mass-distribution product, and the Ford letter asserted that Ford respects legal rights of others' trademarks.)

Yet in 1964, Ford did boldly move into full-scale use of the "Mustang" name on its cars, with probably the most overwhelming advertising campaign in history.

Ford even now denies the confusion due to the joint usage, even though Westward already has obtained specific and documented evidence of confusion of various sorts, and already has affidavits as to public confusion, as at trade shows.

This inquiry, accordingly, merely seeks leads as to further examples of confusion which you may know of, from the joint usage of that same name "Mustang" on products which are as closely related as automobiles and camper and trailer recreational vehicles.

I feel that Ford must have known, at least as early as 1962, of the increasing overlapping nature of the products, at least in the mind of much of the public; and Ford *itself has contributed* to that overlapping of the fields by its sponsorship of truck-mounted camper sales, and its Econoline motorized camper vehicle promotion.

A particular, and perhaps unexpected, problem to Westward, due to the confusion caused by the joint use of the identical name "Mustang" in the close or overlapping field, is that Westward is forced to carry the burden of Ford's *reputation*, whether good or bad; and whether or not the Ford reputation is justified. (The Ford reputation, if it be a *good* reputation, to a prospective buyer of a recreational vehicle, would *not* likely benefit Westward; for the buyer would soon know that Westward "Mustangs" are not associated with Ford, and he then would perhaps

even be suspicious of Westward, on the assumption that Westward was attempting to capitalize on Ford's advertising.)

And as to trailer or camper shoppers who, for one or more reasons do *not* like Ford or Ford products, those shoppers may likely pass by Westward's recreational vehicle "Mustangs" on the same assumption as to a suspicion of Westward using a Ford-advertised name in this field, or because of an assumption that Westward's products are somehow associated with Ford. (For example, a confirmed Chevrolet owner might have a strong dislike for Ford and Ford products, and correspondingly, he might not want to consider buying a camper or trailer bearing the "Mustang" name, which he automatically associates with his prejudice or stigma against Ford products.

Moreover, before Ford's entry, Westward's products were premium quality and admittedly sold at a premium price, in contrast to Ford's "Mustangs" which are relatively low-priced, a bargain-type sports car, which tended to associate the name "Mustang" with a bargain-price product in this overall field. (Ford's widely-advertised $2368 *retail* price was approximately *wholesale* price to Westward's dealers.)

Further, Westward, as early as *1963,* had made specific plans toward a "Mustang" *motorized* or self-propelled unit. This type product seems obviously even closer to the automotive field, and with even more likelihood of confusion with "Mustang" automobiles. Ford has been expanding in the same direction, by promoting Ford's Econoline self-propelled camper vehicle.

But even considering only non-self-propelled recreational vehicles, such as campers and trailers, these products are becoming increasingly associated with the automotive field, in trade-shows, in joint dealerships, in joint promotions of various sorts, etc.

In spite of all these and other factors, Ford denies the confusion, and Ford's main answer to Westward is that Ford carefully labels its products as coming from Ford. Ford appears not to bother itself with confusion which causes the Ford reputation and price-reputation problems to Westward. Thus, we would appreciate further leads as to specific examples of confusion, reputation-carryover, etc.

Please fill out and sign the enclosed blank page (or more preferably your own letterhead), inserting in your own words whatever comments you feel are appropriate. (Actually, for our purpose, it is much better to have your comments notarized as true and under oath, if at all convenient.) Please send this to me within *a week;* and please enclose your charge for your notary fee for prompt reimbursement.

Thanking you in advance for your courteous attention, I am,

Sincerely,

ROBERT A. SPRAY,
Attorney.

Exhibit H.

On the attached sheet, please give comments in your own words, whatever is true and appropriate, as to any confusion and questions as to a Ford relationship of "Mustang" trailers and campers.

Also, comment as to a closeness or overlapping nature of camper and trailer recreational vehicles with the automotive industry in joint promotion, joint dealerships, motorized units, etc; closeness of the overall field in the mind of the public; likelihood and effects of reputation-carryover and price-assumptions; difficulty of Westward maintaining, as dealers, those who also deal in non-Ford auto-

motive products; likelihood that many persons think Ford expanded its product line to pick-up campers and trailers; any confusion mentioned to you by Ford representatives; and indicate whether your comments would be even stronger if Westward were to make a "Mustang" self-propelled vehicle.

Please be as specific as possible, giving examples and details; and please sign the sheet, preferably having it Notarized as true and under oath. Please return it to me within a week. Thanks.

ROBERT A. SPRAY.

One of the responses attached to that affidavit which has not been duplicated by the Appellants, was as follows:

April 25, 1966

To Whom It May Concern:

In reference to comparison between Ford and their sports car "Mustang"—and the Mustang travel trailer, I see no confusion. One is strictly a recreational vehicle and the other is automotive.

I see no reason for such a "fuss" and we are a franchise dealer for Mustang, and, also, we are "Ford family" for the past 40 years, having a fleet of Ford vehicles in our agricultural interest and trailer business and etc. The "Mustang" airplane was built first. Why don't they file suit too?

I say "drop the whole thing".

TREES' TRAILER SALES,
Signed EVERETT E. TREES.

Dated April 25, 1966.

RUTH E. TREES,
Notary Public for Hancock Co., Indiana.
My Commission expires Aug. 20, 1966.

AFFIDAVIT OF ELBERT D. (REX) COX, JR.

Significant portions of the affidavit were omitted. They are:

Being first duly sworn, upon my oath I depose and say that:

1. I am the Executive Director of Indiana Mobile Home Association, 3738 W. Michigan Street, Indianapolis, Indiana, which is the largest trade association in Indiana involving recreational vehicles including campers and travel trailers; and I have a broad background in the recreational vehicle business, and am and have been personally familiar with many of its operations and developments for several years.

• • • • •

14. I think of the Ford "Mustang" automobile whenever I hear the name "Mustang," probably because of the over-whelming nature of Ford's "Mustang" publicity; even though by background and occupation I am vocationally involved with campers and travel trailers, and even though I am quite familiar with the "Mustang" campers and travel trailers of Westward.

15. In contrast to Comment 14, I do not think of the Buick Company when I hear the name "Century", nor do I necessarily think of either specific one of an automobile or a trailer product when I hear other trademarks used by both automobile companies and trailer product manufacturers. The difference between this comment and Comment 14 is due to the overwhelmingness of the Ford "Mustang" publicity, and to the fact that in these other cases the manufacturer more strongly and continuously mentions his own name. That is, for example, when you hear of a Buick Century, the word "Century" is more like a particular model of a Buick; in contrast, the "Mustang" of Ford is much more commonly regarded as a

"Mustang". with relatively less emphasis on its Ford source, both in common-speech references by the public and in Ford's advertising. In other words, with other cars, the maker's name is more dominant, for example, a Buick Century, a Ford Galaxy; while a "Mustang" of Ford is a "Mustang" which happens to have Ford as its source. In contrast to the others, the emphasis in "Mustang" references and advertising is on "Mustang" rather than Ford; and this has been probably a significant key to the success of the Ford "Mustang" even though most people know it is a Ford product.

27-28. Reliable statistics disclose the following sales:

	1960	1961	1962	1963	1964
Truck mounted campers	—	23,703	37,524	50,740	67,889
Travel trailers	52,524	52,487	72,704	97,570	117,814

Sales in 1965 in both categories increased about 11% over 1964.

29d. Probably 800, that is over 10%, of the 6848 dealers in new campers or trailers in the 50 states and North America, also sell automobiles and/or trucks in addition to trailer and/or camper products. . . .

• • • • •

34. The leaflet "The Mobile Home and Recreational Vehicle Industry in Indiana," which is blue, gold and white, is accurate and substantially current in its brief description of the mobile home and recreational vehicle industry in Indiana, and for our trade association.

• • • • •

OMITTED TESTIMONY OF ENOCHS.

E. Edward Enochs, the president of Westward, presented twenty-three affidavits on the Summary Motion. (App. 14-17.) Portions of eighteen of these are quoted in Petitioners' Appendix. (App. 79-81, 83-87.) The deposition of Enochs was taken by respondent Ford. Enochs also testified under oath in the bankruptcy proceedings where

Ford's representatives were not present. Significant portions of the deposition and of the bankruptcy testimony are in conflict with these later day affidavits. Some of the deposition and bankruptcy material is set forth, as well as one omitted affidavit.

Omitted Deposition Testimony.

(Unnumbered Exhibit.)

This witness was the president of Petitioner Westward Coach at the time the suit was commenced. The following testimony was given (numbers in parentheses refer to deposition page numbers):

The Plaintiff built only three mobile homes. This was in 1962. The reason was that the Elkhart Mobile Home Show did not want to exhibit travel trailers at the show, and in order that I could have a display I built these units at that time. (24-26)

In addition to the name Mustang I have used the names Palomino and Stallion. Both names were used for the low-priced units, the economy models. I also built a Chevrolet camper, which I called the Pinto. (28-29)

I have only an Indiana trademark registration. I have applied for a federal registration, but this has been opposed by the White Motor Company. (35-36) We used the White Motor Company hood ornament to apply to my product until just recently. This had their name on it. I "found out to get a die, that cost from $5,000 to $10,000 or better just to get a die made up. And I was sold on the idea of using their (White Motor's) Mustang." This was a five or six inch horse, with the name across the rump, and I put it on the front end of the trailer, and on the truck camper. In addition to this horse, we would use a plastic depiction of a leaping horse or decals. The White Motor Company horse was a facsimile of a real horse in a standing or rearing position and he has his legs up like he is fighting and his tail is touching the ground. The

position of my horse is different from the position of the horse used by the Ford Motor Company, which is in a running position. (47-57)

Appellants state in their abstract (App. 83) that the witness testified that 1965 sales should have been $2,000,000. They neglect to state that the witness said "this is an assumption." (70)

After we had quadrupled our prior production capacity in 1963-64, we could produce 15 to 20 units a day. However, this is not my projection, my goal, because that is a little far out. The actual maximum production in the two factories, the two buildings, had been about five a day, assorted trailers and campers. (77-78)

Other companies that have used the name Mustang have been Chateau Manufacturing "out of Arkansas." They used it at a Texas show. I called my attorney. Chateau quit using it. Champion Home Builders of Dryden, Michigan, also used it on a mobile home. Another occasion it was used in California on a pickup camper. They quit using the name. It has also recently been used by Divco Wayne. We saw a display in the Mobile Home Dealer. There was a Mustang Mobile Homes in Florida, a retail lot, two of them at different locations. (152-62)

In a Popular Mechanics magazine printed in November, 1962, when I first discovered Ford built a "bomb" which they called Mustang the magazine had quoted: "According to Ford executives, there are no plans to mass produce Mustang at present. The car's future depends on the public reaction." (200)

We also used the name Colt on some units beginning back in 1961, but we didn't use it too long, perhaps a year. (247).

A trailer that is of comparable price and quality to mine is Holiday Rambler. I know that they cannot produce enough units. "They build something like 3,000 a year up to now, is my understanding. . . ." This is general knowledge within the industry. (257-58)

To my knowledge there aren't any campers that are more expensive than mine. In some cases it would be one hundred or two hundred dollars more wholesale than the retail price of other campers. In the trailer field, wood trailers, I don't think anybody has quite the price as I do. Air Stream and Streamline are of a different type structure, they use aluminum studding and are aireraft riveted. (63-65)

After considerable discussion of a number of instances in which members of the public indicated they were under the impression that Plaintiff was a part of the Ford Motor Company (118-45)—and in response to which Plaintiff occasionally responded "that's one of our subsidiaries" (120)—Enochs was asked whether it was not the fact that no one had ever asked him whether he built the Ford Mustang automobile. (174) Mr. Enochs said that this was not the fact, that with some research and remembering he could say who did it. The deposition accordingly was adjourned to allow Plaintiff time to review his records and come up with that recollection. When the deposition resumed he said that he had been asked the question, but he could not remember a single specific instance. (176-77) It was apparent that what the witness was saying was that some people, thinking he was associated with the Ford Motor Company, so indicated that fact—and Mr. Enochs occasionally buttressed that impression by referring to the Ford Motor Company as "one of our subsidiaries."

Omitted Testimony in Bankruptcy Proceedings.

(Exhibit 319.)

(References in parentheses are to page numbers of this exhibit.)

Mr. Enochs, Petitioner Westward's president, stated that the contributing factors that brought about the financial difficulty of the corporation were "labor problems, my

prices were low, and lack of production, and pilferage." (6) He stated that the corporation had ceased operations on an active basis around the first of September, 1965, that the corporation had had to pay off bank notes which fell due and which would not be renewed, which drained the corporation's operating capital and left it without liquid funds. (12-13) With respect to his individual claim against the corporation of between $7,200.00 and $7,500.00 which he relinquished in consideration for the assignment of a percentage of the proceeds of any recovery in this litigation, he stated that most of it was where he wouldn't draw salary, wouldn't take his check, or would just leave the cash in the company. (14-15)

With respect to this law suit, in answering a question as to the advice he had received from counsel as to his chances of success, he replied that "actually, most counsel sort of pass it off as a joke. They feel there is a very slim chance of anything." (31) He conceded that if the proposed reorganization were consummated, the complete understanding was any trade name or rights to the name "Mustang" are, and will remain those of the corporation, and he would not retain any interest or right to use the name "Mustang." (34)

Omitted Testimony in E. Edward Enochs' Affidavit "Q".

Omitted from Petitioners' statement is the fact that a brochure attached of Petitioner Westward's products after the bankruptcy reorganization shows that all models bear the name "Mustang" and that other names theretofore used are no longer used on the models in the brochure.

OMITTED TESTIMONY IN ABSTRACT OF FRANK RIZZO DEPOSITION.

(Unnumbered Exhibit)

(Numbers in parentheses refer to deposition page numbers.)

Mr. Rizzo had been Sales Manager of the Plaintiff since August, 1964. (1) Prior to that he had been associated with another trailer manufacturer, Barth Corporation, in sales. (32) He had been in the selling business nearly all his life, having served as a Director in the Bureau of Internal Congress, Director of Marketing for Philco and for R. C. A. Whirlpool. (32, 33)

At a trailer show in Cleveland, Ohio, he had met a Mr. Harry Williams of the Ford Company. Mr. Williams showed Mr. Rizzo a brochure prepared by Ford which showed colored pictures of various trailer manufacturers. Mr. Rizzo complained that Ford had everybody else in there and not Westward Coach. Williams stated that Ford had never received any material from Mr. Enochs, and that was why they didn't. Rizzo then suggested this was a good chance to run a promotion to boost the Plaintiff's sales and they discussed having a Mustang automobile pull a Mustang trailer. Williams thought that was a good idea and suggested that a Ford representative from Indianapolis see if he could work out something on it with Mr. Rizzo. (29, 30)

Rizzo thought this was a good idea, it would help to pick up some dealers and boost sales. He thought it was a good promotion which would help the sale of the Mustang trailers. (30, 31)

After this, Rizzo received a call from the Indiana Truck Sales Manager for Ford, a Mr. J. R. Slough. Mr. Slough said that he had talked to Mr. Williams about this, and with

the local Ford dealer in Elkhart, and the joint promotion had been cleared. All Ford needed was the itinerary which the automobile-trailer caravan would take. Rizzo mailed an itinerary to Ford. However, after Rizzo talked to Mr. Enochs about it and told Enochs he was going to hire a salesman for this purpose, Enochs told him to hold off on that, to do nothing about it. As a result, the matter was dropped by Westward. (20-29)

Appellants' summary of some of this witness' testimony regarding 1964 and 1965 sales (App. 20) is somewhat ambiguous, and implies that those sales were in fact "a couple of million dollars." This was not the witness' testimony. He stated that when he joined Westward Coach it had recently expanded and its production facilities were three or four times more than they had previously been. He then said "if everything would have got right, I mean that we had got our sales, we could have hit that goal," *i.e.* a couple of million dollars in sales which was the forecast based upon the increase in production facilities. (56-57)

OTHER MATERIALS.

The balance of the materials in this Appendix is pertinent to the statement of the material facts and the opinion of the Circuit Court of Appeals which is challenged in the Petition for the Writ of Certiorari.

DEFENDANT'S INTERROGATORIES AND PLAINTIFF'S ANSWERS THERETO.

Type and Quantity of Products Sold by Plaintiff Westward or Its Predecessor.

By its answers to interrogatories numbered 1, 5 and 6, Plaintiff disclosed that its total sales of products under the "Mustang" name were of the type and in the quantities as follows:

	Total	1960	1961	1962	1963	1964	1965
a. Detachable Pickup Campers	443	20	107	121	86	64	45
b. Chassis-Mounted Pickup Campers	11	0	0	2	5	2	2
c. Travel Trailer	409	0	0	2	79	89	239
d. Mobile Homes	1	0	0	0	0	1	0
e. Office Trailers	1	0	0	1	0	0	0
Totals	865	20	107	126	170	156	286

These were scattered throughout the country, with little concentration in any particular state for any particular year:

	Total	1960	1961	1962	1963	1964	1965
California	1	0	0	0	0	0	1
Colorado	5	0	0	0	0	0	5
Connecticut	6	0	0	0	0	2	4
Delaware	17	0	11	3	0	2	1
Florida	15	0	9	3	0	2	1
Georgia	4	0	0	0	1	0	3
Indiana	127	13	11	16	28	25	34
Illinois	84	0	14	18	22	7	23
Iowa	21	0	4	0	1	10	6
Kansas	6	0	3	2	0	0	1
Kentucky	2	0	0	0	2	0	0
Louisiana	3	0	0	1	0	0	2
Maine	3	0	3	0	0	0	0
Maryland	19	0	3	0	3	9	4
Massachusetts	40	0	0	0	31	5	4
Michigan	106	3	17	27	25	12	22
Minnesota	68	0	9	26	10	8	15
Missouri	10	0	7	1	0	2	0
Montana	2	0	0	1	0	1	0
Nebraska	11	0	0	1	5	2	3
New Hampshire	12	0	0	0	0	12	0
New Jersey	15	0	3	1	5	3	3
New York	78	1	1	3	8	15	40
North Carolina	4	0	0	0	0	2	2
Ohio	83	2	3	8	22	15	33
Oregon	3	0	0	0	0	0	3
Pennsylvania	71	1	15	17	9	12	17
Tennessee	8	0	0	0	0	0	8
Texas	8	0	0	1	2	0	5
Virginia	22	0	0	0	2	1	19
West Virginia	17	0	0	0	0	8	9
Washington	3	0	0	0	0	0	3
Wisconsin	16	0	3	1	3	2	7
Foreign	1	0	0	0	0	0	1
Total	891	20	116	130	179	157	279

During this same period Plaintiff was selling campers and travel trailers under other names as well, such as Sport Colt, Palomino, Pinto and Stud. Its total sales of all units of all types and under all names during this period was 1,234 units, about evenly divided between travel trailers and pickup campers.

Defendant's Interrogatory No. 11.

State all other uses of the term and designation "Mustang" and of the representation of a horse, alone and in combination, for any product or service of which the Plaintiff has knowledge or of which the Plaintiff has been informed by anyone, and as to each such use, state the following:

(a) The name and address of the person, firm, corporation, partnership or other entity or organization using such designation.

(b) The product or products and service or services upon or in connection with which such mark or designation is used.

(c) The earliest date of such use known to the Plaintiff, or of which the Plaintiff has been advised, whether or not the Plaintiff has verified such information.

(d) The date the Plaintiff learned of such use.

(e) The action taken by the Plaintiff, if any, upon learning of such use.

Plaintiff's Answer to Defendant's Interrogatory Number 11.

11. (This Response No. 11 is supplemented by Responses 12 and 14, which, to avoid repetition, are not included in this Response No. 11.)

Plaintiff learned of the assertion of various uses by the Defendant's Requests to Admit Nos. 14, 28 and 29, which

Requests were served on Plaintiff on October 11, 1965, said asserted usages being incorporated herein by reference to avoid repetition. Plaintiff has not verified such uses. Plaintiff learned of assertions of use as to certain of these by Plaintiff's searches which are detailed in Response No. 14. No action was taken as to any of such uses, except as indicated in Response No. 12.

Defendant's Interrogatory No. 12.

As to any use of the term "Mustang" or of the representation of a horse, alone or in combination, by any other person, firm, partnership, corporation, association or legal entity or organization, on or in connection with any product, state whether the Plaintiff has made a demand or request that such use be discontinued or modified, or whether the Plaintiff has asserted that such use infringes any mark of the Plaintiff, and, if so, state the following:

(a) The name and address of the other party.

(b) The product or service sold or offered for sale, or in connection with which such party was using such term or mark or representation.

(c) The date Plaintiff learned of such use.

(d) The date Plaintiff made its demand or request or assertion of infringement.

(e) Whether such demand or request or assertion was oral or in writing.

(i) If in writing, state the date thereof, the person who executed such on behalf of the Plaintiff, the person to whom such was addressed, whether Plaintiff has a copy thereof, and the name and address of the person having possession and custody of such copy.

(ii) If such demand or request or assertion was oral, state the date thereof, the place where such was made, the name and address of each person who was present, and the statements made by each person present at such time.

(iii) If in writing, the response, if any, made by such party to such demand or request or assertion, the date thereof, and whether the Plaintiff has a copy; if such response was oral, the place where it was made and the names and addresses of all persons present.

(iv) As to each other related written communication, give the dates thereof, the name and address of the sender, the name and address of the addressee, whether Plaintiff has a copy thereof, and the name and address of the person having possession and custody thereof.

(v) As to each other oral communication, state the date and place thereof and the name and address of each person present.

(f) Whether such use by such party continues at the present time.

(g) Whether the Plaintiff has commenced an action to enjoin such use or to collect damages by reason thereof; and, if so, identify the court in which such action is pending, the date on which it was filed, and the manner in which it is designated.

Plaintiff's Answer to Defendant's Interrogatory Number 12.

12. Plaintiff has made demands and/or taken action as hereinafter specified, relating to the following uses of the term "mustang" or of a representation of a horse:

A. The Ford Motor Company. (The present litigation. The balance of the answer is omitted.)

B. Mustang Mobile Homes, 3312 Phillips Highway, Jacksonville, Florida. (Balance of answer shows notification but no response to notice.)

C. Chateau Manufacturing Company, of Jacksonville, Arkansas. (Balance of answer omitted, shows notification but no response.)

D. B. M. B. Coach Manufacturing Company, P. O. Box 518, Perris, California. (Balance of answer shows notification and advice of no further use.)

E. Divco-Wayne Industries, 680 5th Avenue, New York, New York. (Balance of answer shows notification and advice of no further use.)

F. Champion Home Builders Co., Dryden, Michigan. (Balance of answer shows notification, filing of suit by Westward, and no resolution of suit.)

Defendant's Interrogatory No. 14.

Describe in detail all investigations made by or on behalf of the Plaintiff prior to its adoption and use of the term and designation "Mustang" and the representation of a horse, alone or in combination, and as to each such investigation, state the date thereof, the person or persons making such investigation, whether a written report was made, and, if so, whether the Plaintiff has a copy thereof; and, if Plaintiff does have such a copy, state the name and address of the person having possession and custody thereof. If no written report was made, state the results of such investigation. Supply the same information as to any subsequent investigations.

Plaintiff's Answer to Defendant's Interrogatory No. 14.

14. Prior to Plaintiff adoption of the mark "Mustang" and the representation of a leaping horse, Plaintiff made no formal Trade-mark searches, but Plaintiff's President had investigated the use of the name, in the sense that he was confident that the Trade-marks were not being used in the trailer industry, as a result of his extensive experience in that industry since the year 1954, his experience in said industry having taken him throughout many portions of

the United States. Subsequent to said adoption by Plaintiff, formal Trade-mark searches were made as follows:

A Trade-mark search was made on or about January 9, 1963, by Thomson and Thomson, 80 Federal Street, Boston 10, Mass.; a supplemental search was made by said firm on or about November 30, 1964; a follow-up search report was made on March 9, 1965, by said firm. A copy of each of said reports are in the possession of Robert A. Spray, Plaintiff's Attorney.

Defendant's Interrogatory No. 17.

State the information upon which Plaintiff formed the belief alleged in rhetorical paragraph 9 of its complaint that "the Defendant had used said marks with intent to appropriate said marks to its own use and benefit," and state the name and address of each party known to the Plaintiff to have knowledge of any facts related or pertinent to such information and belief or to have information which might lead to the discovery of such relevant information.

Plaintiff's Answer to Defendant's Interrogatory No. 17.

17. The appropriation and use of the marks by the Defendant is open and notorious, and is of a widespread nature throughout the United States, and has been admitted by the Defendant. Plaintiff believes that such use by the Defendant, subsequent to a warning by the Plaintiff to the Defendant, indicates that such use by Defendant is with an intent to appropriate the mark to the use and benefit of the Defendant.

Defendant's Interrogatory No. 33.

If the Defendant's Request to Admit No. 22 is not unqualifiedly admitted upon the date of the preparation of the answers to these interrogatories, state the name and

address of each person who had such belief and of each person who Plaintiff had been informed has such belief.

Defendant's Interrogatory No. 34.

If the Defendant's Request to Admit No. 23 is not unqualifiedly admitted upon the date of the preparation of the answers to these interrogatories, state each instance when any such statement or representation or implication was made, the date thereof, the name and address of the person by whom it was made and the person to whom it was made, including not only all instances of which the Plaintiff has knowledge, but all instances of which the Plaintiff has in any manner been informed or advised. As to each such statement, representation or implication made orally, state the place where made, the name and address of each person present, and what was said by each party present at such time. As to each such statement, representation or implication which was in writing, state whether the Plaintiff has a copy of the same, the name and address of anyone known to Plaintiff who has a copy of the same, and, in any event, the name and address of the person having possession, custody and control of any such copy.

Defendant's Interrogatory No. 35.

If Defendant's Request to Admit No. 24 is not unqualifiedly admitted upon the date of the preparation of the answers to these interrogatories, state the name and address of each person who has been so confused or deceived, or that the Plaintiff has been informed has experienced such confusion or deception.

Plaintiff's Answer to Defendant's
Interrogatories Numbered 33, 34, and 35.

(Requests to Admit 22-24 are set forth at pages 37-38 of this Appendix. Each referred to the absence of any confusion as to the manufacturer of the Ford "Mustang" automobile. The Exhibits mentioned in the Answer refer to Enochs' Deposition Exhibit Numbers.)

33, 34, and 35. People who have indicated such a belief are as follows: Miss Kathleen L. Pettit, of Concord, Mobile Homes Inc., Elkhart, Indiana; who wrote Plaintiff on January 5, 1965, saying in part, "I mistook Mustang Traveler Co., for Mustang automobiles." and, "there has obviously been some mistake." Mr. LeRoy Clark, 602 Country Club Rd., Urbana, Illinois, who wrote Plaintiff on a letter received by Plaintiff on June 2, 1964 (Defendant's Exhibit No. 14), inquiring about a seat for Ford truck. Others who have expressed confusion as to their belief as to a tie-in of Plaintiff with Ford, even though not necessarily as to Plaintiff being the builder of the Ford "Mustang" are: Records Motors (Defendant's Exhibit 5) who thought Plaintiff was a Ford dealer; L. B. Smith of Pennsylvania, Concrete Pipe (Defendant's Exhibit 6) thought that Plaintiff was associated with Ford Motor Company; Mrs. Records of Records Mobile Home and Trailer Court (Defendant's Exhibit No. 7) thought Plaintiff was a Ford Dealer; Frank Newcomer, President of Fan Coach Company (Defendant's Exhibit No. 10) referred to Plaintiff's trailer as a Ford "Mustang." In referring to Plaintiff's display at Trade Shows, fairly common were inquiries, such as, "Is this a Ford display?", such inquiries having been heard on many occasions by the Plaintiff's President, and by his wife. On one occasion an inquirer at a trade show asked the wife of the Plaintiff's President, "Does your company also build a Ford truck to go with this 'Mustang'

camper?'' On many occasions, such as at trade shows, Plaintiff has heard confusion expressed as to the various factors of confusion of the public, resulting from Ford's use of the trade-mark ''Mustang'' which had already been adopted by Plaintiff as its own trade-mark.

Defendant's Interrogatory No. 49.

Name all of the competitors of Plaintiff, or any predecessor of Plaintiff, during the years 1955 to 1965, separately as to each type of product manufactured or sold by the Plaintiff, or any predecessor of Plaintiff, identified in response to Interrogatory No. 1. As to each competitor so named, state whether each competitive product is of ''high grade and superior quality,'' or, if of some other grade or quality, how Plaintiff would characterize the grade and quality of each type of product of each competitor named in response to the first portion of this interrogatory. Also, name each competitor who has, or during the above period has had, a price equal to or higher than the Plaintiff's, or any predecessor of Plaintiff's, price on the competitive type and model.

Plaintiff's Answer to Defendant's Interrogatory No. 49.

Plaintiff responded in substance that it had a multitude of competitors and that a partial listing in 1965 occupied 70 pages of a trade journal.

Defendant's Interrogatory No. 50.

Set forth in detail the nature and amount of damages which Plaintiff claims to have incurred to date and the manner in which such damages were computed, showing separately as to each item of damage, the amount thereof, the manner in which such damage has been caused by the

actions of the Defendant, the documents or other tangible things upon which the Plaintiff relies in making such claim and such computation, and the names and addresses of all persons having knowledge of any matter with respect thereto. Supply the same information with respect to all other damages which Plaintiff claims a right to recover in this action.

Plaintiff's Answer to Defendant's Interrogatory No. 50.

Plaintiff in part of the answer to the interrogatory stated that it sold 56 "Mustang" units during the first three months of 1964.

Defendant's Interrogatory No. 66.

State the name and address of every person known to Plaintiff to have purchased a product of the Plaintiff bearing the name "MUSTANG" who believed or thought that it was produced by the Defendant, and give in each case the name of the person or persons to whom such belief or thought was communicated.

Plaintiff's Answer to Defendant's Interrogatory No. 66.

66. Plaintiff has no knowledge of anyone who purchased of Plaintiff thinking it was produced by the Defendant; and according to Plaintiff's belief, those persons who thought that Plaintiff's products are produced by the Defendant are persons who have *not* purchased a product of the Plaintiff.

Defendant's Interrogatory No. 67.

State the name and address of every person known to Plaintiff to have purchased a product of the Defendant bearing the name "MUSTANG" who believed or thought

that it was produced by the Plaintiff, and give in each case the name of the person or persons to whom such belief or thought was communicated.

Plaintiff's Answer to Defendant's Interrogatory No. 67.

67. Plaintiff has no knowledge of any such person.

DEFENDANT'S REQUESTS TO ADMIT AND PLAINTIFF'S RESPONSES THERETO.

(For the Court's convenience, each pertinent Request is followed by the applicable Response. There have been deleted those portions of the Responses which the District Court, by its entry of December 9, 1965, ordered Stricken. (R. 44.) Appropriate record references cannot be given since these were treated as Exhibits and were neither bound nor paged.)

Request to Admit No. 1.

"MUSTANG" was not coined or invented by Plaintiff.

Plaintiff's Response.

1. Admits No. 1.

Request to Admit No. 2.

"MUSTANG" is not a distinctive or novel word.

Plaintiff's Response.

2. Admits that the word "Mustang" is not a novel word, in the sense that the word is neither new or coined or invented by the Plaintiff; admits that the word "Mustang" is not distinctive in the sense that the word is not a coined word; but denies that the word "Mustang" is

not distinctive in the sense of serving a Trade-mark function of associating goods with a manufacturer.

Request to Admit No. 3.

"MUSTANG" was derived from an old Spanish word, "mestengo," an adjective meaning "wild, having no conqueror, said of horses and cattle."

Plaintiff's Response.

3. Admits No. 3.

Request to Admit No. 4.

"MUSTANG" is a noun found in dictionaries in common use for over one hundred and fifty years to identify the wild or half-wild horses of the southwest United States and Mexico descended from the stock introduced by the Spanish conquistadores.

Plaintiff's Response.

4. Admits No. 4.

Request to Admit No. 5.

"MUSTANG" from the time of the Civil War, has been used to identify an officer who rose from the enlisted ranks in the United States Navy.

Plaintiff's Response.

5. Admits No. 5.

Request to Admit No. 6.

"MUSTANG" was the name of a famous attack plane of the Navy of the United States during World War II.

Plaintiff's Response.

6. Admits No. 6.

Request to Admit No. 7.

Athletic teams of Southern Methodist University have for many years prior to 1960 been known nationally as "MUSTANGS."

Plaintiff's Response.

7. Admits No. 7.

Request to Admit No. 8.

The Plaintiff has no registration of the term or designation "MUSTANG" or of a representation of a horse, alone or in combination, except such registration as may have been obtained under the applicable provisions of the laws of the State of Indiana.

Plaintiff's Response.

8. Admits No. 8.

Request to Admit No. 9.

The Plaintiff did not adopt or use, prior to September, 1960, the term and designation "MUSTANG" or the representation of a horse, alone or in combination, as a trademark for any product.

Plaintiff's Response.

9. Admits No. 9.

Request to Admit No. 10.

The Plaintiff has not adopted or used the term and designation "MUSTANG" or the representation of a horse, alone or in combination, as a trademark for any products except traveler or camper trailers, coach or utility bodies mountable on small trucks and commonly known as "pickup campers," and three mobile homes.

Plaintiff's Response.

As the stated products are defined in "Request to Admit No. 35," the Plaintiff admits No. 10. However, as pointed out in more detail in Plaintiff's response No. 35, Plaintiff denies the accuracy of the definitions stated for the various products, and thus Plaintiff limits its admission No. 10 accordingly. (Request to Admit No. 35 defined these products as follows: In the industry in which Plaintiff is engaged, the various products are classified for statistical and other purposes and such classes generally may be described as follows:

(a) *Mobile Homes*—over 30 feet in length, primarily used for housing not travel, semi-permanently located, and transported generally by special tow trucks.

(b) *Travel Trailers*—under 30 feet in length, normally used for travel, camping and recreation, towed generally by a passenger car.

(c) *Truck Campers*—sometimes called a pick-up camper or pick-up coach, mounted in the bed of a pick-up truck or chassis-mounted coach permanently mounted upon a pick-up chassis instead of temporarily on the bed, and generally used as (b) above.)

Request to Admit No. 11.

It has been a common practice of many years standing for manufacturers of mobile homes, travel trailers and campers to adopt names used by automotive companies on their trucks and passenger cars, and also for automotive companies to adopt names for trucks and passenger cars used by manufacturers of mobile homes, travel trailers and campers.

Request to Admit No. 12.

Examples of the common practice stated in the foregoing Request to Admit No. 11 are shown by the brand names used by manufacturers taken from the Ninth Annual Directory of Mobile Homes, Travel Trailers, Campers, Services and Products, issued November 5, 1964, and United States Patent Office records. In the first column under each name appears the name of the manufacturer or manufacturers of mobile homes, travel trailers or campers using such name taken from the directory, and in the second column the corresponding manufacturer of automobiles or trucks which uses, has used or has registered the name. Where the name is registered in the United States Patent Office, the fact is indicated by (Reg.) after the manufacturer.

APACHE

Honorbilt Trailer Mfg. Co. 19940 Hanson Avenue Lakeview, California	General Motors Corp. (Reg.)
Maverick Mobile Home Corporation 3616 E. Admiral Place Tulsa, Oklahoma	
Vesely Company (Reg.) 2101 N. Lapeer Road Lapeer, Michigan	

BEL-AIRE

Belvedere Mobile Homes — General Motors Corp.
111 Belvedere Road
Elkhart, Indiana

BISCAYNE

Nellej of Florida, Inc. — General Motors Corp. (Reg.)
Post Office Box 1296
Oneco, Florida

Skyline Homes, Inc.
2520 By-Pass Road
Elkhart, Indiana

CAPRI

Buddy Mobile Homes — Ford Motor Company (Reg.)
(Div. of Skyline Homes, Inc.)
1601 W. Bristol Street
Elkhart, Indiana

Yellowstone, Inc.
2400 W. Mishawaka Road
Elkhart, Indiana

CARDINAL

Adams Trailer Mfg. — Ford Motor Company (Reg.)
11310 Stewart
El Monte, California

CENTURY

20th Century Mobile Homes Ltd. — General Motors Corp.
Box 72
London, Ontario, Canada

Henslee Mobile Homes, Inc.
2410 W. Division
Arlington, Texas

Larado Mobile Homes, Inc.
Post Office Box 923
Lamar, Colorado

CITATION

Continental Mfg. Co., Inc. — Ford Motor Company
2211 W. Eighth
Loveland, Colorado

20th Century Mobile Homes Ltd.
Box 72
London, Ontario, Canada

COLONY PARK

Buddy Mobile Homes, Inc. — Ford Motor Company, (Reg.)
(Div. of Skyline Homes, Inc.)
1601 W. Bristol Street
Elkhart, Indiana

COMMANDER

Glendale Mobile Homes, Ltd. — Studebaker Mfg. Corp. (Reg.)
145 Queen Street
Strathroy, Ontario, Canada

Honorbilt Trailer Mfg. Co.
19940 Hanson Avenue
Lakeview, California

Marlette Coach Company
3305 Wilson Street
Marlette, Michigan

McCoy Mfg. & Sales Co.
400 E. Iowa
Indianola, Iowa

CONESTOGA

Concord Mobile Homes, Inc. — Studebaker Mfg. Corp. (Reg.)
Rt. #19, South
Elkhart, Indiana

CONTINENTAL

Covered Wagon Trailer Mfg., Inc. — Ford Motor Company (Reg.)
Post Office Box 170
Elkhart, Indiana

Marshfield Homes, Inc.
2301 East 4th Street
Marshfield, Wisconsin

Trade Winds Campers, Inc.
1211-1231 Depot Street
Manawa, Wisconsin

CORONET

Taylor Mobile Homes — Chrysler Corporation
110 Leslie Street
Troy, North Carolina

COUNTRY SQUIRE

Homette Corporation — Ford Motor Company (Reg.)
(Div. of Skyline Homes, Inc.)
2825 Middlebury Street
Elkhart, Indiana

Marshfield Homes, Inc.
2301 East 4th Street
Marshfield, Wisconsin

CRUISER

Driftwood Homes Corp. — Ford Motor Company
Rural Route #2, County Rd. #6
Elkhart, Indiana — Studebaker Mfg. Corp.

CUTLASS

Hillcrest Homes — General Motors Corp.
(Div. of Skyline Homes, Inc.)
2421 S. 17th Street
Elkhart, Indiana

DART

Arrow Trailers, Inc. — Chrysler Corporation (Reg.)
Lincoln & Merriam
Nappanee, Indiana

Zipper, Inc.
900 S. Broad Street
Clinton, South Carolina

DIPLOMAT

Vagabond Division
(Div. of Guerdon Industries, Inc.)
17600 West 8 Mile Road
Southfield, Michigan

American Motors Corporation

ECONOLINE

Krager Kustom Koach, Inc.
9 SW 4th Street
Osseo, Minnesota

Ford Motor Company

ELDORADO

Honorbilt Trailer Mfg. Co., Inc.
Box 157
Minneapolis, Kansas

General Motors Corp.

Kropf Manufacturing Co., Inc.
Post Office Box 514
Goshen, Indiana

ELECTRA

Henslee Mobile Homes, Inc.
2410 W. Division
Arlington, Texas

General Motors Corp.

FAIRLANE

Consolidated Mobile Ind. Corp.
777 West 190th Street
Gardena, California

Ford Motor Company (Reg.)

FALCON

Azalea Homes
212 S. Livingston Street
Clinton, South Carolina

Ford Motor Company (Reg.)

Comet Construction Co.
Box 857
Coffeyville, Kansas

Shipp-ette Mobile Homes, Inc.
1851½ Independence Avenue
Waterloo, Iowa

Rimer, Inc. (Reg.)
Clinton, South Carolina

Western Coach Corp.
Box 905
Phoenix, Arizona

FURY

Driftwood Homes Corp. — Chrysler Corporation
Rural Route #2, County Road #6
Elkhart, Indiana

Zipper, Inc.
900 S. Broad Street
Clinton, South Carolina

GALAXIE

El Dorado Mfg. Co. — Ford Motor Company (Reg.)
15420 Fraser Highway
North Surrey, British Columbia, Can.

GREENBRIAR

Skyline Homes, Inc. — General Motors Corp. (Reg.)
2520 By-Pass Road
Elkhart, Indiana

HOLIDAY

Avion Coach Corp. — General Motors Corp.
1300 E. Empire Avenue
Benton Harbor, Michigan

Easy Travler Trailer Co.
Post Office Box 170
Elkhart, Indiana

Rocket Trailers Ltd.
6925 103rd Street
Edmonton, Alberta, Canada

Standard Coach Co.
371 West Union Street
Nanticoke, Pennsylvania

IMPERIAL

Avion Coach Corp. — Chrysler Corporation (Reg.)
1300 E. Empire Avenue
Benton Harbor, Michigan

Covered Wagon Trailer Mfg., Inc.
Post Office Box 170
Elkhart, Indiana

Stanley N. Lewis (Reg.)
Gardena, California

Pacemaker Mobile Homes (Lonergan)
1810 W. Lusher Avenue
Elkhart, Indiana

Starlite Mfg. Co.
10835 Fremont
Ontario, California

Taylor Mobile Homes
110 Leslie Street
Troy, North Carolina

Western Coach Corp.
Box 905
Phoenix, Arizona

Mobile of Marysville, Inc.

INTERNATIONAL

Airstream, Inc. — International Harvester Company
Jackson Center, Ohio

Covered Wagon Trailer Mfg., Inc.
Post Office Box 170
Elkhart, Indiana

INTERNATIONAL SCOUT

Gad-About Trailers
Fairview, Michigan

International Harvester Company

LANDCRUISER

DeVille Industries, Inc.
Route #4
Elkhart, Indiana

Studebaker Mfg. Corp.

Jeep

LARK

Foremost Mobile Home Mfg. Corp.
Post Office Box 430
Denton, Texas

Herzig Manufacturing Co.
West 23rd
Fremont, Nebraska

Studebaker Mfg. Corp. (Reg.)

MATADOR

Siesta Products, Inc.
3127 Maple Drive, N. E.
Atlanta, Georgia

Chrysler Corporation

METEOR

Fireball Trailer Mfg., Inc.
10125 Wystone Street
Northridge, California

Santa Fe Springs Division
(Divco-Wayne Ind., Inc.)
13538 Excelsior Drive
Santa Fe Springs, California

Ford Motor Company (Reg.)

METRO

Redman Industries, Inc.
(New Moon Homes)
7800 Carpenter Freeway
Dallas, Texas

International Harvester Company

MONTEREY

Sportcraft Trailer Mfg. Co. — Ford Motor Company (Reg.)

MONTCLAIR

Montclair Mobile Homes, Inc. (Reg.) — Ford Motor Company (Reg.)
1333 Bon View Avenue
Ontario, California

Richardson Homes Corp. (Reg.)
2421 S. Nappanee Street
Elkhart, Indiana

MUSTANG

Westward Coach Mfg. Co., Inc. — Ford Motor Company
726 Middleton Run Road
Elkhart, Indiana

PACER

Lonergan Corp. — Ford Motor Company
1810 W. Lusher Avenue
Elkhart, Indiana

PARKLANE

Belvedere Mobile Homes — Ford Motor Company (Reg.)
111 Belvedere Road
Elkhart, Indiana

PONTIAC

Detroiter Mobile Homes, Inc. — General Motors Corporation (Reg.)
1517 Virginia Street
St. Louis, Michigan

RAMBLER

Klinger Products Corp. — American Motors Corp. (Reg.)
Wakarusa, Indiana

Trade Winds Campers, Inc.
1211-1231 Depot Street
Manawa, Wisconsin

RANCHERO

Vought Industries, Inc. (Reg.)
Texarkana, Texas — Ford Motor Company (Reg.)

RANGER

Forly Engineering Co.
921 Cedar Avenue
Minneapolis, Minnesota — Ford Motor Company (Reg.)

Prior Products, Inc. (Reg.)
Dallas, Texas

Ritz-Craft, Inc.
Argos, Indiana

Trotwood Trailers, Inc.
11 North Broadway
Trotwood, Ohio

Comet Mobilhomes
Box 857
Coffeyville, Kansas

REBEL

The Adventure Line Mfg. Co., Inc.
339 Main Street
Parsons, Kansas — American Motors Corp.

ROCKET

All State Trailer Co., Inc.
Post Office Box 337, Warehouse Row
Jacksonville, Arkansas — General Motors Corp.

Fireball Trailer Mfg., Inc.
10125 Wystone Street
Northridge, California

Silver Streak Trailer Co.
2319 North Chico Avenue
El Monte, California

SAFARI

Roadway Trailers Ltd. General Motors Corp.
6925 103rd Street
Edmonton, Alberta, Canada

Coons Custom Mfg., Inc.

SEVILLE

Sportcraft Trailer Mfg. Co., Inc. General Motors Corp.

SKYLARK

E-Z Kamper, Inc. General Motors Corp.
Loyal, Wisconsin

Skyline Homes, Inc.
2520 By-Pass Road
Elkhart, Indiana

STARFIRE

Driftwood Homes Corp. General Motors Corp.
R. R. #2, County Road #6
Elkhart, Indiana

SUBURBAN

Trotwood Trailers, Inc. Chrysler Corporation
11 North Broadway
Trotwood, Ohio

TEMPEST

Northwestern Mobile Homes General Motors Corp. (Reg.)
(Div. of Rainway Mfg. Co.)
Box 248
Veradale, Washington

THUNDERBIRD

Driftwood Homes Corp. Ford Motor Company (Reg.)
R. R. #2, County Rd. #6
Elkhart, Indiana

E-Z Kamper, Inc.
Loyal, Wisconsin

VILLAGER

Frontier Homes Corp.
110 North 24th Street
Omaha, Nebraska

Ford Motor Company (Reg.)

Pathfinder Mobile Home, Inc.
Box 117
Spencer, Wisconsin

VOYAGER

Alair Coach Corporation
Post Office Box 216
Baroda, Michigan

Ford Motor Company

Request to Admit No. 13.

Set forth below are registrations in the United States Patent Office of the same or similar names for automobiles or trucks on the one hand and mobile homes, travel trailers or campers on the other, together with the application number, registration number, date of application and registration and publication in the Official Gazette and the name of the registrant.

APACHE

Vesly Mfg. Co.
Lapeer, Michigan
For: Camp trailers and parts
*SN: 51,088 F: May 5, 1958
RN: 673,431 R: Feb. 3, 1959
Use: July 1, 1957
O. G. Nov. 18, 1958

General Motors Corporation
Detroit, Michigan
For: Trucks
SN: 29,058 F: Apr. 29, 1957
RN: 655,742 R: Dec. 17, 1957
Use: Apr. 3, 1957
O. G. Oct. 1, 1957

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* SN—serial number of application
RN—registration number
F—date of filing of application
R—date of issuance of registration
O. G.—date of publication in the Official Gazette

FALCON

Rimer, Inc.
Clinton, South Carolina
For: Mobile Homes
SN: 214,287 F: Mar. 16, 1965
Rn: _____ R: _____
Use: Nov. 1, 1964

Ford Motor Company
Dearborn, Michigan
For: Automobiles
SN: 67,054 F: Feb. 4, 1959
RN: 688,639 R: Nov. 24, 1959
Use: Jan. 23, 1959
O. G. Sept. 8, 1959

IMPERIAL

Stanley N. Lewis
Gardena, California
For: House trailers
SN: 94,782 F: Apr. 11, 1960
RN: 721,243 R: Sept. 12, 1961
Use: Mar. 11, 1957
O. G. June 27, 1961

Chrysler Corporation
Detroit, Michigan
For: Auto and parts
SN: 283,553 F: May 6, 1929
RN: 271,219 R: May 27, 1930
Use: Oct. 27, 1928

MONTCLAIR

Montclair Mobile Homes, Inc.
Montclair, California
For: Mobile residences
SN: 101,454
RN: 712,433

Ford Motor Company
Dearborn, Michigan
For: Automobiles
SN: 24,954 F: Feb. 25, 1957
RN: 652,312 R: Oct. 1, 1957

RANCHERO

Vought Industries, Inc.
Texarkana, Texas
For: Mobile homes
SN: 93,886 F: Mar. 28, 1960
RN: 709,562 R: Jan. 10, 1961
Use: Apr. 19, 1956
O. G. Oct. 25, 1960

Ford Motor Company
Dearborn, Michigan
For: Automobiles
SN: 24,152 F: Feb. 11, 1957
RN: 651,672 R: Sept. 17, 1957
Use: Jan. 18, 1957
O. G. July 2, 1957

RANGER

Prior Products, Inc.
Dallas, Texas
For: Farm wagons and trailers
SN: 658,138 F: Dec. 17, 1953
RN: 610,578 R: Aug. 16, 1955
Use: March, 1948

Ford Motor Company
Dearborn, Michigan
For: Automobiles
SN: 16,205 F: Sept. 24, 1956
RN: 647,733 R: July 2, 1957
Use:
O. G. Feb. 19, 1957

Plaintiff's Response.

11, 12, 13. Is without knowledge of the duration of time involved in the subject matter of Request No. 11 and 12, and thus denies in Request No. 11 that the practice is of "many years standing"; Is without knowledge as to whether in Request No. 11 and 12 the first user was an automobile company or a trailer company, and thus denies the request to the extent it implies which was the first user. Except as hereinabove indicated, Plaintiff admits Requests No. 11, 12 and 13, as set forth.

Request to Admit No. 14.

(Westward admitted that following Ford's use of "Mustang" it was adopted as a tradename or corporate name by many firms and that in July 1965 there were at least thirty-one such businesses.)

Request to Admit No. 15.

The representation of a horse appearing upon the forepart of the mobile home units manufactured or sold by Plaintiff and designated "MUSTANG" were originally manufactured for or by White Motor Company.

Plaintiff's Response.

15. Admits Request No. 15, except that prior to the White representations there was a short period when Plaintiff used its own decals. The usage of the White representations by Plaintiff was discontinued in early 1965. During the period of usage by Plaintiff of the White representations, Plaintiff also used other representations, as set forth in response to Request No. 17.

Request to Admit No. 21.

The Plaintiff has never manufactured automobiles or trucks, it has made no studies with respect to the entry

into the business of manufacturing automobiles and trucks, and it has no plans to enter into the business of manufacturing automobiles and trucks.

Plaintiff's Response.

21. Admits it has never manufactured automobiles or trucks; admits it has made no studies with respect thereto except as relate to motorized or self-propelled units providing living quarters; denies making no studies to the extent that such a motorized unit would be for certain purposes considered to be an automobile or truck; admits that it has no present plans to enter into the business of manufacture of automobiles and trucks, except to such motorized units.

Request to Admit No. 22.

The Plaintiff knows of no person, firm, partnership, corporation, association, or other legal entity or organization who believes that the "MUSTANG" automobile manufactured and sold by the Defendant was a product which had been manufactured by the Plaintiff.

Plaintiff's Response.

22. Admits the allegations of Request No. 21 to the extent it refers to specific entities by name, other than that already disclosed to Defendant at the prior oral deposition by Ford of Plaintiff's officers.

Request to Admit No. 23.

The Plaintiff knows of no instance when any representative of the Defendant, or anyone else, ever stated or represented or implied that the "MUSTANG" automobile manufactured and sold by the Defendant had, in fact, been manufactured by or originated with the Plaintiff.

Plaintiff's Response.

23. Admits it has no knowledge of any such instance.

Request to Admit No. 24.

The plaintiff knows of no person, firm, partnership, corporation, association, or other legal entity or organization who has been confused or deceived as to the source of origin of the "MUSTANG" automobile manufactured and sold by the Defendant.

Plaintiff's Response.

24. Plaintiff incorporates its response No. 22, in entirety, as response to this Request No. 24.

Request to Admit No. 33.

Plaintiff in the past has used and then abandoned use of the tradenames "Colt," "Palomino," "Pinto," and "Stallion."

Plaintiff's Response.

33. Admits Request No. 33.

Request to Admit No. 34.

The prominent display of the word "MUSTANG" and the display of a representation of a rearing horse by White Motor Company on the hoods of motor vehicles sold by it does not infringe any rights claimed by the Plaintiff to the use of the word "MUSTANG" or of the representation of a horse.

Plaintiff's Response.

34. Admits Request No. 34.

ABSTRACT OF PATENT OFFICE FILE WRAPPER OF WESTWARD'S APPLICATION FOR FEDERAL TRADEMARK REGISTRATION.

(Exhibit 314.)

(References in parentheses are to page numbers of this exhibit.)

On October 22, 1962, Westward filed in the United States Patent Office an application to register the mark "Mustang (and illustration)" designating the goods upon which it had been used as "utility coaches, vans, vehicle-carried accomodation (sic) for campers or travelers." (3)

Following an examination of the application, the examiner advised Westward as follows (10):

> "The identification of goods is indefinite. The goods should be more clearly identified. It is suggested that common descriptive terms used in the trade be substituted for the present identification. If the utility coaches are house trailers it is suggested that it be so stated. If the vans are motor trucks with van bodies, it is suggested that it be so stated. If the vehicle-carried accommodation for campers or travelers are camper bodies for pickup trucks or small trucks, it is suggested that it be so stated."

Westward thereafter filed an amended declaration of goods on September 10, 1963, as follows (11):

> "camper bodies for pick-up trucks or small trucks, truck campers, and travel trailers."

On October 9, 1963, the hearing examiner again responded to Westward (14) that "It is still believed that the terms 'utility coaches' and 'vans' are indefinite. The goods referred to by these terms should be more clearly identified." By a subsequent amendment filed April 8, 1964 (15), Plain-

tiff said that the Patent Office should "cancel the identification of the goods and change to:

> —utility van bodies mountable on pick-up trucks and small trucks for providing trailer-type housing and storage accommodations for travellers and sportsmen, coach bodies known as campers for providing such accommodation and mountable on an associated vehicle or carrying unit such as a truck or boat unit, such as a pontoon frame, and trailers—."

The Patent Office ultimately published the mark on November 24, 1964 (32). On December 23, 1964, the White Motor Company filed an opposition to Westward's registration in which it stated that since December, 1951, it had used the mark "Mustang" for "internal combustion piston type engines for heavy-duty automotive trucks and transport tractors" and had been granted a federal trademark registration on October 21, 1958. It further stated that it had used the trademark "Mustang" and a pictorial representation of a horse" as the name for its executive dining room at its head office in Cleveland, Ohio. Finally, it stated that "since at least as early as 1939" it had "continually associated horses with its products" as evidenced by two specified registrations (63-65). (This first opposition was unverified, and a verified opposition substantially identical in terms was filed on January 22, 1965 (67-80).)

By its answer filed March 17, 1965, in paragraph three thereof, Westward stated as follows (82-83):

> "As to rhetorical paragraph 3 of said Notice, Applicant denies a confusing similarity of Applicant's mark with respect to Opposer's mark, considering: (a) There are significant differences in the nature of Opposer's engine (an accessory of a vehicle, engines being the only product of Opposer on which the Opposer's mark Mustang is used as a trademark) from Applicant's mobile homes and campers; (b) There are

significant differences in the nature of the buyers of the engine of Opposer and Applicants' mobile homes and campers; (c) The nature of distribution is significantly different for the engines of Opposer and the mobile homes and campers of Applicant; (d) There is a difference in Patent Office classification of Opposer's engines (Class 23) and Applicant's mobile homes and campers (Class 19); (e) Opposer's engines are used in larger assemblies, in contrast to Applicant's mobile homes and campers which are sold and used as an ultimate product; (f) In the long period in which Opposer and Applicant have used the Mustang mark on their respective products, no confusion has been heard of by Applicant; (g) In the long period in which Opposer and Applicant have used the Mustang mark on their respective products, no confusion has been heretofore asserted by Opposer; (h) If actual confusion would occur, it would have occurred before now, both Opposer's and Applicant's use having been quite widespread, with respect to geographical area, length of time, and widespread advertising, yet none has apparently occurred; . . ."

In response to the contention of the Opposer that a registration granted to Westward "will constitute a continued threat to Opposer insofar as its free use of the words, MUSTANG, is concerned" (69) Westward responded as follows (86):

"Applicant denies rhetorical paragraph 10 of said Notice. Applicant has recognized and hereby affirms its recognition of Opposer's free use of the trademark Mustang (and closely similar words, and a horse) to products for which Opposer used such mark prior to Applicant's entry into the field, and to any other products for which Opposer uses the mark prior to use by Applicant on such other marks. And as to products on which Applicant has first use relative to Opposer, including specifically the goods to which this application specifically relates, the 'continued threat to opposer' is wholly theoretical for Opposer does not (to

the best of Applicant's knowledge) use the mark on such products; and if Opposer has begun or will begin to use the mark on these goods, the 'threat' is Applicant's prior use (well recognized at common law as the basis of the right) rather than the registration here sought. Accordingly, the Opposer will not be damaged by the registration here sought; for by the registration the Opposer will not lose any rights which it would otherwise have. . . ."

Before accepting the application for registration and the publication of the filing thereof, the Patent Office had refused registration because the mark claimed so resembled a registration of the mark "Mustang" by "Mustang Trailer Company" for "trailers, truck trailers, and parts therefor." (10) Westward conducted an investigation, the result of which was to indicate that the Mustang Trailer Company was no longer in business. Nevertheless, publication was refused until Westward had proceeded to obtain cancellation of that registration (11-59).

An agreement was entered into between White and Westward concerning White's opposition, reading as follows:

"AGREEMENT.

This Agreement entered into by and between Westward Coach Manufacturing Company, Inc., an Indiana corporation, having an office and place of business in Elkhart, Indiana, hereinafter referred to as WESTWARD, and White Motor Corporation, a corporation of the State of Ohio, having its principal office and place of business at 100 Erieview Plaza, Cleveland, Ohio, hereinafter referred to as WHITE:

WHEREAS, WESTWARD is the applicant in United States Trademark application Serial No. 158,116 for the trademark MUSTANG & DES. which application was published for opposition at page TM 171 of the *Official Gazette* of November 24, 1964;

WHEREAS, WHITE instituted Opposition No. 44,753 against the granting of such registration; and,

WHEREAS, the parties wish to adjust their differences and dispose of such opposition amicably;

NOW, THEREFORE, it is agreed as follows:

1. Promptly after the execution of this Agreement, the attorneys for the parties will execute on behalf of the parties, a Stipulated Motion dismissing the opposition with prejudice and cause such stipulated motion to be filed in the United States Patent Office.

2. WHITE hereby covenants not to sue WESTWARD for trademark infringement for use of the trademark MUSTANG and or a pictorial representation of a horse so long as WESTWARD limits its use of such trademark and/or representation in the manner set out in paragraphs 3-5 below.

3. WESTWARD hereby agrees to forthwith discontinue the use of MUSTANG emblems obtained from WHITE whether or not they include the trademark WHITE.

4. WESTWARD agrees to and forthwith will cease to use the trademark WHITE and/or a pictorial representation of a horse identical to or confusingly similar with pictorial representation of a horse used by WHITE as set forth in the appendices to the above-identified opposition.

5. WESTWARD agrees it will not commence to manufacture and sell, under the trademark MUSTANG any product which is apt to be, in the eyes of the purchasing public, confusingly similar as to source or origin with any product of WHITE.

6. In the event that the parties cannot agree as to some possible future product of WESTWARD, that such future product is not confusingly similar with a product of WHITE, the matter will be submitted to arbitration by the American Arbitration Association in accordance with the rules of said Association, and the parties agree to be bound by the results of such arbitration."

(Request to Admit, United States District Court for the Southern District of Indiana, Cause No. 65-C-199.)

On July 5, 1967, pursuant to prior stipulation, the opposition of White was dismissed with prejudice. (Request to Admit, United States District Court for the Southern District of Indiana, Cause No. 65-C-199.)

On September 5, 1967, the name "Mustang" with the depiction of a horse was registered on the Principal Register in the United States Patent Office in Westward's name for trailers and campers.

AFFIDAVIT OF ROBERT J. FISHER.

(Exhibit 315.)

(Caption omitted.)

Robert J. Fisher, being sworn upon his oath deposes and says that:

(1) He is Advertising Manager for the Ford Division of Ford Motor Company, Defendant in the above-entitled cause, and hereinafter referred to as Defendant, and has been employed by Defendant in various positions in its advertising operations for more than ten years and is responsible for all advertising of said Division, and as such Manager he is familiar with matters herein set forth.

(2) Defendant has its principal place of business at Dearborn, in the State of Michigan and is engaged in the production and sale of automobiles, trucks and other products, and was so engaged at all times referred to herein.

(3) Said Ford Division is responsible for advertising and selling all of Defendant's Ford car and truck products, including the Ford Mustang car.

(4) Defendant has since long prior to the commencement of this action produced and continues to produce automobiles under the primary names of FORD, MERCURY and LINCOLN. It distinguishes models of these automobiles, one from another, with such secondary names as GALAXIE, FAIRLANE and FALCON.

(5) Defendant on October 7, 1962 introduced an experimental display model bearing the name MUSTANG.

(6) Defendant on April 17, 1964 introduced the Ford Mustang production model to the public and continues to sell such models to its authorized dealers who resell them to the public.

(7) The Defendant has extensively advertised the Ford Mustang model. The amount of advertising expenditures for the Mustang model alone from the time of the announcement through September 31, 1965, exceeded 16 million dollars. The detail of expenditures by media of the aforesaid expenditures are set forth in Exhibit A attached hereto. All of such advertising has prominently displayed or used the name FORD or FORD MOTOR COMPANY in such a fashion as to make it clear that the car was a product of Defendant. Typical newspaper and magazine advertising of Defendant's Mustang are attached hereto and marked Exhibit B-1 to 66.

(8) In addition to the advertising referred to in 7 above, Defendant advertised the Mustang car as one of Ford's family of fine cars in association with its other cars and trucks. Such advertising has been extensive but since several other models have been featured in such advertisements, there is no way to allocate accurately the portion properly attributable to the Mustang. All such advertising featured the name FORD or FORD MOTOR COMPANY.

(9) In addition to the advertising referred to in 6 above, dealers of Defendant have extensively advertised the Ford Mustang model through local radio, television, newspapers, billboards and other media. The cost of such advertising during the period the Mustang car has been on the market is estimated to be several millions of dollars. Such advertising has prominently featured the name FORD or FORD MOTOR COMPANY. Examples of such

advertising are set forth in Exhibits C-1 to 84 attached hereto and made a part hereof.

(10) Many suppliers of products to Defendant have run advertisements in many media advertising the Mustang and the fact that the advertising company supplies parts or material for the car. Examples of such advertising are set forth in Exhibits D-1 to 6 attached hereto and made a part hereof. (The example ads were by General Tire, DuPont, Fram, Alcoa, Johns-Manville and Trailer Tram.)

(11) Manufacturers of other products have used Mustang cars as prizes for contests or for tie-in advertising. Examples of such advertising are set forth in Exhibits E-1 to 17 attached hereto and made a part hereof. (Among others were ads of Purina, Ken-L-Ration, Hermes, Dobbs Hats, Minute Rice, Cudahy Meats, Listerine, Dr. Pepper, Roblee Shoes, Hudson's, General Electric, DX and Longine Watches.)

(12) Many products associated with the MUSTANG name were advertised, offered for sale or trademark registrations obtained for them by others prior to Defendant's use of the name. Among others, are the following products:

Trucks manufactured by Mitsubishi in Japan; automobiles in England; marine engines; trucks by Maudsley of England; trailers; fabrics; fish bait; men's trousers; pistols and revolvers; asbestos siding; lariats and lariat rope; wheat flour (foreign); fresh vegetables; storage batteries, cranes (truck mountable); brake linings; tires; springs (automobile); motorcycles; tractors; mufflers; engines (automobile and truck); simulated leather (plastic); fireworks; footballs; basketballs; soccer balls; engines (motorcycle); handsaws; socket wrenches; and aircraft.

(13) In addition, many products associated with the MUSTANG name have been advertised, offered for sale or trademark registrations obtained for them by others since

Defendant's use of the name. Among others are the following:

After-shave tonics; arc welders; bags; basketballs; bath talc; bluejeans; camp kits; carpet; chap stick; cough syrup; derricks; electric knives; enamel; fishing tackle; flour; garden tillers; gloves; hair tonic; hats; homes; horns (automobile); jewelry; junior powered cars; lariats; leather goods; luggage; mobile homes; moccasins; outboard motor boats; paint; paper; pickles; picnic coolers; pre-shave lotion; radio and television antennae; rifles; sailboats; saws; shoes; slacks; small gasoline engines; sports jackets; steel; stud drivers; sunglasses; sweatshirts; tennis rackets; tents; toys; vinyl flooring; water skis; snow mobiles.

(14) Defendant does not manufacture or market a motor home, mobile home, trailer or camper and he has no knowledge of any plans for it to do so.

(15) It is common practice for automobile manufacturers and manufacturers of mobile homes and travel trailers to use the same names for their products. Some of these names appearing in advertisement, trade directories, Patent Office registrations and otherwise are:

APACHE

Honorbilt Trailer Mfg. Co.
19940 Hanson Avenue
Lakeview, California

General Motors Corp. (Reg.)*

Maverick Mobile Home Corporation
3616 E. Admiral Place
Tulsa, Oklahoma

Vesely Company (Reg.)
2101 N. Lapeer Road
Lapeer, Michigan

BEL-AIRE

Belvedere Mobile Homes
111 Belvedere Road
Elkhart, Indiana

General Motors Corp.

* "(Reg.)" indicates a registered Federal trademark.

BISCAYNE

Nellej of Florida, Inc. — General Motors Corp. (Reg.)
P. O. Box 1296
Oneco, Florida

Skyline Homes, Inc.
2520 By-Pass Road
Elkhart, Indiana

CAPRI

Buddy Mobile Homes — Ford Motor Company (Reg.)
(Div. of Skyline Homes, Inc.)
1601 W. Bristol Street
Elkhart, Indiana

Yellowstone, Inc.
2400 W. Mishawaka Road
Elkhart, Indiana

CARDINAL

Adams Trailer Mfg. — Ford Motor Company (Reg.)
11310 Stewart
El Monte, California

CENTURY

20th Century Mobile Homes Ltd. — General Motors Corp.
Box 72
London, Ontario, Canada

Henslee Mobile Homes, Inc.
2410 W. Division
Arlington, Texas

Larado Mobile Homes, Inc.
Post Office Box 923
Lamar, Colorado

CITATION

Continental Mfg. Co., Inc. — Ford Motor Company
2211 W. Eighth
Loveland, Colorado

20th Century Mobile Homes Ltd.
Box 72
London, Ontario, Canada

COLONY PARK

Buddy Mobile Homes, Inc. Ford Motor Company (Reg.)
(Div. of Skyline Homes, Inc.)
1601 W. Bristol Street
Elkhart, Indiana

COMMANDER

Glendale Mobile Homes, Ltd Studebaker Mfg. Corp. (Reg.)
145 Queen Street
Strathroy, Ontario, Canada

Honorbilt Trailer Mfg. Co.
19940 Hanson Avenue
Lakeview, California

Marlette Coach Company
3305 Wilson Street
Marlette, Michigan

McCoy Mfg. & Sales Co.
400 E. Iowa
Indianola, Iowa

CONESTOGA

Concord Mobile Homes, Inc. Studebaker Mfg. Corp. (Reg.)
Rt. #19, South
Elkhart, Indiana

CONTINENTAL

Covered Wagon Trailer Mfg., Inc. Ford Motor Co. (Reg.)
Post Office Box 170
Elkhart, Indiana

Marshfield Homes, Inc.
2301 East 4th Street
Marshfield, Wisconsin.

Trade Winds Campers, Inc.
1211-1231 Depot Street
Manawa, Wisconsin

CORONET

Taylor Mobile Homes Chrysler Corporation
110 Leslie Street
Troy, North Carolina

COUNTRY SQUIRE

Homette Corporation — Ford Motor Company (Reg.)
(Div. of Skyline Homes, Inc.)
2825 Middlebury Street
Elkhart, Indiana

Marshfield Homes, Inc.
2301 East 4th Street
Marshfield, Wisconsin

CRUISER

Driftwood Homes Corp. — Ford Motor Company
Rural Route #2, County Rd. #6
Elkhart, Indiana — Studebaker Mfg. Corp.

CUTLASS

Hillcrest Homes — General Motors Corp.
(Div. of Skyline Homes, Inc.)
2421 S. 17th Street
Elkhart, Indiana

DART

Arrow Trailers, Inc. — Chrysler Corp. (Reg)
Lincoln & Merriam
Nappanee, Indiana

Zipper, Inc.
900 S. Broad Street
Clinton, South Carolina

DIPLOMAT

Vagabond Division — American Motors Corp.
(Div. of Guerdon Industries, Inc.)
17600 West 8 Mile Road
Southfield, Michigan

ECONOLINE

Krager Kustom Koach, Inc. — Ford Motor Company
9 SW 4th Street
Osseo, Minnesota

ELDORADO

Honorbilt Trailer Mfg. Co., Inc. — General Motors Corp.
Box 157
Minneapolis, Kansas

Kropf Manufacturing Co., Inc.
Post Office Box 514
Goshen, Indiana

ELECTRA

Henslee Mobile Homes, Inc. — General Motors Corp.
2410 W. Division
Arlington, Texas

FAIRLANE

Consolidated Mobile Ind. Corp. — Ford Motor Co. (Reg.)
777 West 190th Street
Gardena, California

FALCON

Azalea Homes — Ford Motor Co. (Reg)
212 S. Livingston Street
Clinton, South Carolina

Comet Construction Co.
Box 857
Coffeyville, Kansas

Shipp-ette Mobile Homes, Inc.
1851½ Independence Avenue
Waterloo, Iowa

Rimer, Inc. (Reg)
Clinton, South Carolina

Western Coach Corp.
Box 905
Phoenix, Arizona

FURY

Driftwood Homes Corp. — Chrysler Corporation
Rural Route #2, County Road #6
Elkhart, Indiana

Zipper, Inc.
900 S. Broad Street
Clinton, South Carolina

GALAXIE

El Dorado Mfg. Co. — Ford Motor Company (Reg)
15420 Fraser Highway
North Surrey, British Columbia, Can.

GREENBRIAR

Skyline Homes, Inc. — General Motors Corp. (Reg)
2520 By-Pass Road
Elkhart, Indiana

HOLIDAY

Avion Coach Corp. — General Motors Corp.
1300 E. Empire Avenue
Benton Harbor, Michigan

Easy Traveler Trailer Co.
Post Office Box 170
Elkhart, Indiana

Rocket Trailers Ltd.
6925 103rd Street
Edmonton, Alberta, Canada

Standard Coach Co.
371 West Union Street
Nanticoke, Pennsylvania

IMPERIAL

Avion Coach Corp. — Chrysler Corp. (Reg)
1300 E. Empire Avenue
Benton Harbor, Michigan

Covered Wagon Trailer Mfg., Inc.
Post Office Box 170
Elkhart, Indiana

Stanley N. Lewis (Reg)
Gardena, California

Pacemaker Mobile Homes (Lonergan)
1810 W. Lusher Avenue
Elkhart, Indiana

Starlite Mfg. Co.
10835 Fremont
Ontario, California

Taylor Mobile Homes
110 Leslie Street
Troy, North Carolina

Western Coach Corp.
Box 905
Phoenix, Arizona

Mobile of Marysville, Inc.

INTERNATIONAL

Airstream, Inc.
Jackson Center, Ohio

International Harvester Company

Covered Wagon Trailer Mfg., Inc.
Post Office Box 170
Elkhart, Indiana

INTERNATIONAL SCOUT

Gad-About Trailers
Fairview, Michigan

International Harvester Co.

LANDCRUISER

DeVille Industries, Inc.
Route #4
Elkhart, Indiana

Studebaker Mfg. Corp.

Jeep

LARK

Foremost Mobile Home Mfg. Corp.
Post Office Box 430
Denton, Texas

Studebaker Mfg. Corp. (Reg)

MATADOR

Siesta Products, Inc.
3127 Maple Drive, N.E.
Atlanta, Georgia

Chrysler Corporation

METEOR

Fireball Trailer Mfg., Inc. — Ford Motor Co. (Reg)
10125 Wystone Street
Northridge, California

Santa Fe Springs Division
(Divco-Wayne Ind., Inc.)
13538 Excelsior Drive
Santa Fe Springs, California

METRO

Redman Industries, Inc. — International Harvester Company
(New Moon Homes)
7800 Carpenter Freeway
Dallas, Texas

MONTEREY

Sportcraft Trailer Mfg. Co. — Ford Motor Company (Reg)

MONTCLAIR

Montclair Mobile Homes, Inc. — Ford Motor Company (Reg)
(Reg)
1333 Bon View Avenue
Ontario, California

Richardson Homes Corp. (Reg)
2421 S. Nappanee Street
Elkhart, Indiana

MUSTANG

Westward Coach Mfg. Co., Inc. — Ford Motor Company
726 Middleton Run Road
Elkhart, Indiana

PACER

Lonergan Corp. — Ford Motor Company
1810 W. Lusher Avenue
Elkhart, Indiana

PARKLANE

Belvedere Mobile Homes — Ford Motor Company (Reg)
111 Belvedere Road
Elkhart, Indiana

PONTIAC

Detroiter Mobile Homes, Inc. — General Motors Corp. (Reg)
1517 Virginia Street
St. Louis, Michigan

RAMBLER

Klinger Products Corp. — American Motors Corp. (Reg)
Wakarusa, Indiana

Trade Winds Campers, Inc.
1211-1231 Depot Street
Manawa, Wisconsin

RANCHERO

Vought Industries, Inc. (Reg) — Ford Motor Company (Reg)
Texarkana, Texas

RANGER

Forlyn Engineering Co. — Ford Motor Company (Reg)
921 Cedar Avenue
Minneapolis, Minnesota

Prior Products, Inc. (Reg)
Dallas, Texas

Ritz-Craft, Inc.
Argos, Indiana

Trotwood Trailers, Inc.
11 North Broadway
Trotwood, Ohio

Comet Mobilhomes
Box 857
Coffeyville, Kansas

REBEL

The Adventure Line Mfg. Co. Inc. — American Motors Corp.
339 Main Street
Parsons, Kansas

ROCKET

All State Trailer Co., Inc.
P. O. Box 337, Warehouse Row
Jacksonville, Arkansas — General Motors Corp.

Fireball Trailer Mfg., Inc.
10125 Wystone Street
Northridge, California

Silver Streak Trailer Co.
2319 North Chico Avenue
El Monte, California

SAFARI

Roadway Trailers Ltd.
6925 103rd Street
Edmonton, Alberta, Canada — General Motors Corp.

Coons Custom Mfg., Inc.

SEVILLE

Sportcraft Trailer Mfg. Co., Inc. — General Motors Corp.

SKYLARK

EZ-Kamper, Inc.
Loyal, Wisconsin — General Motors Corp.

Skyline Homes, Inc.
2520 By-Pass Road
Elkhart, Indiana

STARFIRE

Driftwood Homes Corp.
R.R. #2, County Road #6
Elkhart, Indiana — General Motors Corp.

SUBURBAN

Trotwood Trailers, Inc.
11 North Broadway
Trotwood, Ohio — Chrysler Corporation

TEMPEST

Northwestern Mobile Homes (Div. of Rainway Mfg. Co.)
Box 248
Veradale, Washington — General Motors Corp. (Reg)

THUNDERBIRD

Driftwood Homes Corp.
R.R. #2, County Road #6
Elkhart, Indiana

E-Z Kamper, Inc.
Loyal, Wisconsin — Ford Motor Co. (Reg)

VILLAGER

Frontier Homes Corp.
110 North 24th Street
Omaha, Nebraska

Pathfinder Mobile Home, Inc.
Box 117
Spencer, Wisconsin — Ford Motor Co. (Reg)

VOYAGER

Alair Coach Corporation
Post Office Box 216
Baroda, Michigan — Ford Motor Company

(16) The emblem of a rearing horse has been used by Ferrari and Porsche for many years in connection with the advertising and sale of their automobiles in the United States and other parts of the world. The emblems, as so used, are set forth in Exhibits G-1 and 2. The emblem of a horse has been used on many products and is registered as a part of hundreds of trademarks.

(17) The name FORD appears prominently upon all Mustang models on the front, rear and interior of such car, see Exhibits F-1 to F-3 attached hereto and made a part hereof.

ROBERT J. FISHER.

(Jurat omitted.)

Examples of supplier's ads (Exhibits D-1 to 6) were attached to the affidavit. The example ads were by General Tire, DuPont, Fram, Johns-Manville, Alcoa and Trailer Train.

Examples of manufacturer's ads offering Mustang automobiles as prizes or for tie-in advertising (Exhibits E-1 to 17) were attached to the affidavit. The example ads were by Ken-L Rations, Hermes, Purina, Dobbs Hats, Minute Rice, Cudahy, Listerine, Dr. Pepper, Roblee Shoes, Hudson's, General Electric and DX.

OMITTED TESTIMONY IN AFFIDAVIT OF GORDON B. MACKENZIE.

(Exhibit 316.)

Omitted from the Petitioners' Appendix was the affidavit of this witness that Respondent issues a written warranty with each Ford "Mustang" car, clearly indicating that the car originated with Ford Motor Company.

OMITTED TESTIMONY IN AFFIDAVIT OF P. E. SHARP.

(Exhibit 317.)

At the time of their introduction in April, 1964, the price for the two-door hardtop (the lowest priced "Mustang" automobile) was $1,917.78, and the suggested retail price was $2,390.50. The wholesale delivered price and suggested retail price of the highest-priced Ford "Mustang" automobile were, respectively, $3,055.47 and $3,831.50.

OMISSIONS FROM BANKRUPTCY TESTIMONY.

(Exhibit 319.)

One of the offerors for the stock of Westward in reorganization was a Mr. Hughes, a certified public accountant who had previously worked for an accounting firm in Elkhart with many clients in the mobile home field. (42-44) He had examined the assets of the corporation in preparing the proposal to be made, and the things which they considered were the assets and value of the business as a going concern, but not the name "Mustang." He stated that when he looked at the things that were of value, that he put a price tag on, he did not consider this name to be of value. (69)

Another witness, Mr. Frost, was a second accountant who had examined the books of the corporation for an investment concern which was trying to refinance the plaintiff corporation. (77-78) This analysis of the business of the corporation for the three years 1963-65 disclosed the following information, for each of the three years in question:

	1963	1964	1965
Units sold	229	319	377
Average sales price	$1,840.52	$1,863.61	$1,988.14
Materials cost per trailer	1,219.29	1,334.40	1,454.62
Factory labor cost per trailer	349.11	307.52	370.91
Overhead per trailer	333.41	284.91	321.89
Amount by which costs exceeded average sales price	61.19	63.15	159.28

The witness stated that he was appearing on behalf of Mr. Enochs, that he had been employed by Mr. Enochs after having made this study because it was apparent that Enochs had been paying somebody else for accounting services which he just wasn't getting. (79-82) When asked whether he had made any examination of the value of the claim of

the corporation against Ford, he stated that the only opinion he had ever heard anybody voice was that they didn't think it was worth ten cents. (83)

Another one of the offerors testified that in regard to the law suit, they did not want any part, not even ten percent, but that the only way they could acquire the assets of the company was to proceed by a reorganization, which was more expensive. However, they did it because Plaintiff's attorney advised that if the company were not a going concern and coaches were not being produced or made, the law suit would be jeopardized. The new management "couldn't care less about the suit that he has with Ford Motor Company. We feel it is worthless, and we are in it to make trailers, and we are not in it to make some money on a law suit." (91-92) When asked whether he had been advised as to the value of the ten percent which the corporation was to retain as the value of the law suit, he said "Our attorney thinks it is worthless." When asked whether the offerors had received any advice to the contrary, he said no, that "all four of us have different attorneys, and we have contacted our own individual attorneys, and we are not interested at all." (93)

OMITTED TESTIMONY IN AFFIDAVIT OF F. H. BIGELOW.

(Exhibit 320.)

Bigelow is the Recreation Vehicle Specialist of the Ford Division of the Ford Motor Company. The affidavit states that Ford Motor Company "does not make or sell motor homes, mobile homes, travel trailers, camper coaches to be attached to or used in conjunction with pick up trucks or any similar type of product." It likewise states that, while certain of its trucks may be converted for camping use by the user, "such converted units are not manufactured

or sold by Ford Motor Company." The testimony of this witness makes clear that "the manufacturers of such conversion units sell them to automobile dealers and consumers," and that "Ford Motor Company does not make or sell such conversion units nor does it sell vehicles converted with such units."

EXCERPTS FROM BANKRUPTCY PROCEEDINGS.

IN THE DISTRICT COURT OF THE UNITED STATES

In the Northern District of Indiana,

South Bend Division.

In the Matter of Westward Coach Manufacturing Company, Inc., Debtor.	No. 6191.

Order Allowing Amended Plan of Arrangement.

Upon the annexed Petition of Westward Coach Manufacturing Company, Inc., the above named Debtor, praying that it be granted leave to propose a modification of the Arrangement under Chapter XI of the Bankruptcy Act, proposed in the Petition of said Debtor filed on the 14th day of December, 1965, and that this Court find that said modification does not materially and adversely affect the interest of any Creditor, and that this Court adjudge that said modification is duly proposed herein, and it appearing that no notice of a Hearing on said Petition should be given, and no adverse interest having been represented, and sufficient reason appearing to me therefor, it is

Ordered that leave be, and it hereby is, granted to Westward Coach Manufacturing Company, Inc., the above named

Debtor, to propose a modification of said Arrangement so as to eliminate therefrom the provisions of Paragraph seven (7) thereof, and to provide instead in said paragraph the following:

> "It is understood that your Corporation has a lawsuit pending against Ford Motor Company; upon approval of the Arrangement, the Corporation would assign to Mr. E. Edward Enochs fifty per cent (50%) of the net amount recovered from said lawsuit; forty-five percent (45%) of the net amount would be assigned to the Trustee in Bankruptcy for the benefit of creditors of the Corporation; and five (5%) of the net amount would remain a part of the corporate assets; and Mr. Enochs will, therefore, cancel in full his note and any other notes due and owing to stockholders. The net amount recovered from said lawsuit shall be computed as the amount remaining after the deductions of all costs and expenses and fees incurred by Mr. Enochs for said lawsuit from the proceeds recovered as a result of said lawsuit. Mr. Enochs shall assume all costs, expenses and fees of said lawsuit to the extent that the amount of the proceeds recovered as a result of said lawsuit do not exceed said costs, expenses and fees. Mr. Enochs shall have full authority to settle or terminate said lawsuit. If the balances originally owed to creditors would be paid from the said assignment of the net amount recovered as a result of said lawsuit, the Trustee shall convey ten per cent (10%) of any excess of said assignment of net proceeds over the balances originally owed to the creditors to the Corporate assets and the remaining ninety per cent (90%) to Mr. Enochs. We make no assurances regarding other lawsuits wherein you are Plaintiff."

And it is hereby

Found that said modification does not materially and adversely affect the interest of any Creditor; and it is hereby

Adjudged that said modification and said arrangement as

so modified, a copy of which modified Arrangement is annexed to the annexed Petition of said Debtor, are duly proposed herein.

Dated: Jan. 28, 1966.

ROBERT A. GRANT,
Judge, United States District Court.

Assignment by Corporation.

Whereas, Westward Coach Manufacturing Co., Inc., has used the name and emblem "Mustang" as a trademark for its goods, and said trade-mark has been an intangible asset of said Westward, the value of said trade-mark being not precisely known; and

Whereas, use of the said name and emblem by Ford Motor Company has caused said Westward to assert a claim against said Ford for damages and an injunction, the value of said claim not being precisely known; and

Whereas, in pressing said claim against said Ford, said Westward Coach Manufacturing Co., Inc., has filed suit in Indianapolis, Indiana (United States District Court for the Southern District of Indiana, Indianapolis Division, Cause No. IP 65-C-199), the suit being now pending, and the value and expenses of said suit not being precisely known, and Robert A. Spray, Attorney, is serving as attorney for Westward, and for Westward's trustee specified hereinafter, in said suit, his serving as attorney being agreeable to all the undersigned; and

Whereas, either or both of E. Edward Enochs and Bernice Enochs may desire to join personally as a part or parties in said suit, this being agreeable to all the undersigned; and

Whereas, the matters involving said "Mustang" trade-

mark and said Ford are assets not having a precisely known value at the present time; and

Whereas, the nature of any recovery from Ford is not precisely known, and could relate to damages, injunction, sale or release to Ford of rights to the said name, emblem, or other property to Ford or any affiliate thereof, the value of the total of all the above, whether by settlement or judgment or otherwise, and regardless of how or to whom the recovery is designated, being agreed by all the undersigned as benefit of the Ford matter; and

Whereas, said Westward is now undergoing bankruptcy proceedings at the present time, in the United States District Court, Northern District of Indiana, South Bend Division, Bankruptcy No. 6191; the trustee being Ray Grainger, and there are not sufficient funds of said Westward to pay all claims of creditors, and a Plan of Arrangement has been confirmed in said bankruptcy; and

Whereas, the said E. Edward Enochs and Bernice Enochs surrenders hereby any and all claims he or she or they may have for monies due them or either of them from Westward; and

Whereas, this Assignment by Corporation is a part of said Plan of Arrangement;

All the Undersigned Do Agree as Follows:

1. Westward Coach Mfg. Co., Inc., hereby assigns the net recovery of any benefit of the Ford matter as follows: Forty-five (45%) percent to the trustee for the benefit of creditors of said Westward and Fifty (50%) percent to E. Edward Enochs and Bernice Enochs, Pursuant to Par. 7 of the Amended Plan of Arrangement, Bankruptcy #6191, Dist. Ct. of the U. S. Northern District of Indiana, South Bend Div.

2. Net recovery means the value of any benefit of the Ford matter, after subtracting attorney fees, and after

subtracting expenses of said Ford matter, all such expenses being reimbursed to the person or persons who paid the same.

WESTWARD COACH MANUFACTURING CO., INC.
By PHILIP F. KERDAISH,
Its President.

Attest
By LA MAR E. HUGHES,
Its Secretary.

WESTWARD COACH MANUFACTURING CO., INC.
(Debtor)
By RAY GRAINGER, *Trustee,*
E. EDWARD ENOCHS,
BERNICE ENOCHS.

Exhibit E.

IN THE DISTRICT COURT OF THE UNITED STATES.

In the Northern District of Indiana,

South Bend Division.

In the Matter of Westward Coach Manufacturing Company, Inc., *Debtor.*	In Proceedings for an Arrangement No. 6191.

Arrangement.

That Westward Manufacturing Company, Inc., the above named debtor, has received and accepted the following offer of purchase and arrangement which it proposes for its unsecured creditors:

1. That proceedings through your Attorney be taken immediately to proceed under Section 321, Chapter XI of the Bankruptcy Act, such proceeding to be filed on or about

December 17, 1965, with a Trustee to be appointed as may be selected by your Attorney.

2. The Purchasers would propose to pay in full all Secured Creditors of the Corporation and all debts having priority under Section 64(a) of the Bankruptcy Act, and to pay unsecured Creditors of the Corporation fifteen per cent (15%) of the face amount of their filed claims.

3. That administrative salaries of the Corporation be terminated as of the day of filing a Petition under Chapter XI of the Bankruptcy Act, leaving as employees Mrs. Larrabee, the factory superintendent and two production employees.

4. That this Plan be subject to the ability of the proposed Purchasers to make an arrangement with Mr. Dee Moody, legal owner of the real estate leased by the Corporation, to acquire the Purchase Agreement wherein your stockholder, Mr. E. Edward Enochs, is purchasing said real estate, subject to the payment to Mr. Enochs of Seven Thousand Five Hundred Dollars ($7,500), with real estate taxes to be prorated as of date of final approval of the Plan of Arrangement, which taxes shall be deducted from said purchase price of $7,500.00, together with One Thousand Forty-Five and 85/100 Dollars ($1,045.85) owed by Mr. Enochs to Mr. Moody and any delinquencies in said real estate purchase payments. In addition, Mr. Enochs would agree not to enter into competition with the Corporation as a stockholder or owner, directly or indirectly, in the manufacture of travel trailers for a period of one (1) year from date of final approval of the Plan.

5. The Purchasers would propose to place in escrow, at the bank of your choice, the sum of Twenty-Three Thousand Dollars ($23,000.00), to guarantee its bona fides with reference to this Plan of Arrangement, said sum to be returned to Purchasers in event this Plan is not approved.

6. The Purchasers would propose to pay all expenses of administration as may be allowed or approved by the Court, in cash, in full upon confirmation of the Arrangement by the deposit for this purpose not to exceed the sum of Five Thousand Dollars ($5,000.00).

7. It is understood that your Corporation has a lawsuit pending against Ford Motor Company; upon approval of the Arrangement, the Corporation would assign to Mr. E. Edward Enochs fifty per cent (50%) of the net amount recovered from said lawsuit; forty-five per cent (45%) of the net amount would be assigned to the Trustee in Bankruptcy for the benefit of creditors of the Corporation; and five per cent (5%) of the net amount would remain a part of the corporate assets; and Mr. Enochs will, therefore, cancel in full his note and any other notes due and owing to stockholders. The net amount recovered from said lawsuit shall be computed as the amount remaining after the deductions of all costs, expenses and fees incurred by Mr. Enochs for said lawsuit from the proceeds recovered as a result of said lawsuit. Mr. Enochs shall assume all costs, expenses and fees of said lawsuit to the extent that the amount of the proceeds recovered as a result of said lawsuit do not exceed said costs, expenses and fees. Mr. Enochs shall have full authority to settle or terminate said lawsuit. If the balances originally owed to creditors would be paid from the said assignment of the net amount recovered as a result of said lawsuit, the Trustee shall convey ten per cent (10%) of any excess of said assignment of net proceeds over the balances originally owed to the creditors to the corporate assets, and the remaining ninety per cent (90%) to Mr. Enochs. We make no assurance regarding other lawsuits wherein you are Plaintiff.

8. All the stock of said Corporation will further be delivered to said Escrow Agent properly endorsed in blank, with signatures thereon guaranteed, conditioned upon de-

livering to Purchasers upon final confirmation of the Plan. Your stockholders and directors will take all actions necessary to implement the proceedings herein, to warrant the ownership of stock, and to cooperate with the Purchasers and the Court in orderly disposition of the matters herein.

9. Until final approval Purchasers may desire, at their own expense, to use finished inventory for demonstration, and that to the extent possible, this will be done.

10. Purchasers will assume all debts incurred in the ordinary course of business after the filing of the Plan of Arrangements, subject to final approval of the Plan.

11. Purchasers retain the option to withdraw its offer in this proposed Plan if the financial statement is materially different from that represented by you to the Purchasers, if the unsecured Accounts Payable exceed One Hundred Fifty-Three Thousand Dollars ($153,000.00) approved as claims, or if the Plan is not finally approved within sixty (60) days of filing, and may accordingly withdraw all funds deposited.

12. It is understood some of the conditions may be changed by order of the Court as to your undertakings herein with reference to the business operation after filing, and to such extent you are relieved from compliance.

13. That the Court retain jurisdiction until all the provisions of the Arrangement have been performed.

Dated, January 21, 1966.

WESTWARD COACH MANUFACTURING COMPANY, INC.,
BY DEDARIO & KATZ,
BERNARD KATZ,
Attorney for Bankrupt.

Purchasers: LaMar Hughes, James Wellington, Philip Keidaish, Thomas Tuttle.

BY JOHN D. ULMER,
Attorney for Purchasers.

SUMMARY OF TRADEMARK REGISTRATIONS DEPICTING A HORSE.

The depiction of a horse has been federally registered as a trademark at least 250 times for all manner of products. The vast majority of such registrations were prior to Westward's Indiana registration. (Exs. 2-305.)

The depiction of a horse with the name "Mustang" was registered federally by various persons for a variety of products at least eleven times before Westward's Indiana registration of the mark for its products. (Exs. 2, 4, 7, 9, 12, 16, 19, 21, 22, 26 and 54) The depiction of a horse with the names "Pinto," "Bronco," "Stallion" and "Colt" was federally registered by various persons for a variety of products before Westward's adoption of the names. (Exs. 56, 57, 58, 59, 60, 61 and 62)

ENTRY FOR APRIL 29, 1966.

(R. 299-301.)

At the hearing on Defendant's Motion for Summary Judgment set for April 29, 1966, Plaintiff was given further time to file material in opposition, and a briefing schedule was established. The issue to be presented by the motion was also agreed upon, as follows:

> "Plaintiffs and Defendant agreed that the Motion for Summary Judgment presented substantive questions of law in the area of trademarks, tradenames and unfair competition."

COUNTERCLAIM.

The Ford Motor Company had filed a counterclaim in the action in the District Court before the Summary Judgment was sought on the complaint. The counterclaim is still pending. After the issuance of the federal registration to Westward, a supplemental counterclaim was filed on March 20, 1968. It is:

SUPPLEMENTAL COUNTERCLAIM.

Comes now the Defendant Ford Motor Company, pursuant to Rule 15(d) of the Federal Rules of Civil Procedure, and files this supplemental counterclaim setting forth occurrences and events which have transpired subsequent to the date its counterclaim was filed herein on November 4, 1965, and alleges as follows:

9. On July 29, 1966, this Court granted the Defendant's motion for summary judgment upon the claims and issues presented by Plaintiffs' complaint and Defendant's answer thereto. On October 5, 1966, the Court denied the Plaintiffs' motion to alter or amend such judgment.

10. On January 9, 1968, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of this Court, and subsequently denied a rehearing thereon.

11. On September 5, 1967, the United States Patent Office issued trademark registration number 834,606 to the Counterdefendant Westward Coach Manufacturing Company, Inc., for the trademark of the word "Mustang" in combination with the design of a leaping or charging horse. The application for registration alleged that the mark was used upon the following goods:

> "Utility van bodies mountable on pick-up trucks and small trucks for providing trailer-type housing and

storage accommodations for travellers and sportsmen, coach bodies known as campers for providing such accommodation and mountable on an associated vehicle or carrying unit such as a truck or boat unit such as a pontoon frame, and trailers, in Class 19."

Upon the appeal and in connection upon the request for rehearing the Counterdefendant Westward Coach Manufacturing, Inc. charged that it was entitled to protection and relief upon the recently granted federal registration.

12. In order to afford full and complete relief between the parties with respect to the asserted trademark rights of Counterdefendant, and to avoid unnecessary further litigation and irreparable injury to Counterclaimant, this Court should enter its judgment in the form heretofore requested, finding and declaring expressly the right of the Counterclaimant to the continued use of the term and designation "MUSTANG" and the representation of a horse separately or in combination, upon and in connection with the sale and advertising for sale of its automobile without being in violation of any right of the Counterdefendant.

WHEREFORE, the Counterclaimant respectfully prays for the entry of a judgment against Counterdefendant as originally requested, together with such further general and different relief as the facts alleged herein and the nature of the case may require, and as to the Court appears proper, and that Counterclaimant recover its costs.

Westward has requested an extension of time to respond to the counterclaim.

SUMMARY OF "MUSTANG" TRADEMARK REGISTRATIONS.

A book of registrations of the name "Mustang" and the depiction of a horse is a part of the record on the motion for summary judgment. (Exs. 2-305.) The registrations contained show that the name "Mustang", alone or in combination with the depiction of a horse, was in the Patent Office twenty-six times before it was adopted by Westward. One of the registrations was for trailers. Westward's registration was held up until Westward secured the cancellation of this prior registration for trailers on the grounds of abandonment. One of the other registrations of the name prior to Westward's adoption was by White Motor Company which opposed Westward's registration. After the adoption of the name by Westward, the name "Mustang", alone or in combination with the depiction of a horse, was registered twelve additional times, and registration had been sought by eighteen companies after Ford's adoption of the name. The products covered by these applications and registrations of "Mustang" were of a wide variety.

The depiction of a horse in a trademark registration has been registered at least two hundred and fifty times in connection with such names as "Mustang," "Palomino," "Pinto," "Bronco," and many others.

OMITTED TESTIMONY IN AFFIDAVIT OF R. E. DIKEMAN.

(Exhibit 318.)

R. E. Dikeman is an account executive of R. L. Polk and Co., which compiles statistics relating to vehicle registrations. The affidavit sets forth, by state, registrations of the Ford Mustang automobile for each month during the period April 1964 through September 1965. Registrations were made in every one of the fifty states, and totaled 645,416 during this eighteen month period.

PREME COURT, U. S.

FILED
JUN 3 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1406

WESTWARD COACH MANUFACTURING COMPANY, INC., AND RAY GRAINGER, TRUSTEE IN BANKRUPTCY OF WESTWARD COACH MANUFACTURING COMPANY, INC.,
Petitioners,

vs.

FORD MOTOR COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

HARRY T. ICE,
JAMES E. HAWES, JR.,
10th Floor, 111 Monument Circle,
Indianapolis, Indiana 46204,

JOHN R. SPIELMAN,
Ford Motor Company,
American Road,
Dearborn, Michigan 48121,
Attorneys for Respondent.

Of Counsel:

ICE MILLER DONADIO & RYAN,
10th Floor, 111 Monument Circle,
Indianapolis, Indiana 46204.

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WESTWARD COACH MANUFACTURING COMPANY, INC., AND RAY GRAINGER, TRUSTEE IN BANKRUPTCY OF WESTWARD COACH MANUFACTURING COMPANY, INC.,
Petitioners,

vs.

FORD MOTOR COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The Petitioners have not presented a concise statement of the case containing the facts material to the questions presented as required by Rule 23(e) of this Court. The statement is incomplete, inaccurate, and, on some matters, false. In others, Petitioners have gone outside the record with false statements.

The Respondent, in order to properly present its position in opposition, has added an appendix of additional facts from the record.

The Respondent is also obliged to restate the record to give the Court a chronological, accurate, and complete understanding of the material facts. In so doing, we shall refer only to the glaringly false, inaccurate and outside-of-the-record statements.

The Nature of the Case and Its Disposition.

Plaintiff Westward on April 28, 1965, filed a three-count complaint charging the Defendant, Ford, with infringement of an alleged common law trademark in count one, with common law unfair competition in count two, and with infringement of an Indiana statutory trademark registration in count three. Jurisdiction of the Court is alleged in each count of the complaint to be based upon diversity of citizenship and the amount in controversy. Judgment is requested in each count of $3,000,000 for compensatory damages; for punitive damages; for an injunction to perpetually restrain Defendant, Ford, directly and through its agents and dealers, from using the trademark "Mustang" with the representation of a charging horse in the State of Indiana and throughout the world; for attorneys' fees; for costs of the action; and for such other and further relief as is just. (App. 2-3.)*

The answer of the Defendant consisted of one defense to each of the three counts of the complaint. The answer admitted and denied specific allegations of the complaint. (App. 3.)

It was disclosed at a scheduled pre-trial conference on January 6, 1966, that the Plaintiff Westward had recently

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* Citations:

(App. .....) refers to Appendix to Petition for Writ of Certiorari.

(R. App. .....) refers to Appendix to this Brief in Opposition to the Writ.

(Pet. .....) refers to Petition for Writ of Certiorari.

filed a reorganization proceeding under Chapter XI of the Bankruptcy Act in the South Bend Division of the United States District Court for the Northern District of Indiana. Thereafter, on February 4, 1966, Ray Grainger, Trustee of Westward appointed by that Court, petitioned to be added as a party plaintiff in accordance with the authorization and direction of that Court. The Trustee was added as a party plaintiff on February 8, 1966. (App. 7.)

Defendant, Ford, filed a counterclaim for a Declaratory Judgment against the original Plaintiff on November 4, 1965, before the addition of the Trustee as a party. (App. 7.)

Defendant, Ford, filed a Motion for Summary Judgment on February 21, 1966, upon all counts of the complaint and upon its counterclaim. (App. 7-8.) On July 6, 1966, Defendant, Ford, moved to withdraw that part of its Motion seeking Summary Judgment upon its counterclaim. That Motion was granted, and that part of the Motion for Summary Judgment was stricken. (App. 8.)

The Motion for Summary Judgment, as amended, was submitted to the Court, and on July 29, 1966, the Court granted Summary Judgment in favor of the Defendant. (App. 41.)

Thereafter, and on August 29, 1966, Robert A. Spray, who throughout the District Court proceedings was the sole counsel for Plaintiffs, filed a motion as counsel for E. Edward Enochs, Bernice Enochs and Buelah Vaught, seeking to have them added as parties "and/or intervene." The motion alleged that they were the former (pre-bankruptcy) shareholders and directors of Plaintiff Westward, and that the first two were also employees. The Court overruled the motion. (App. 49-50.)

Plaintiffs appealed from the granting of the Summary Judgment to Defendant, and denial of the motion that E.

Edward Enochs, Bernice Enochs and Buelah Vaught be added as parties "and/or intervene." On January 9, 1968, the Seventh Circuit Court of Appeals affirmed the District Court. (App. 50-65.) Petitioners' petition for a certification of questions to this Court and for a rehearing was denied on February 7, 1968, by the Court of Appeals. (App. 66.)

Petitioners do not here challenge the correctness of the denial of intervention to these individuals.

STATEMENT OF FACTS.

(i) Petitioner Westward's Business.

E. Edward Enochs, in 1960, began making campers of wood construction for mounting on pick-up trucks. (App. 20.) He began marketing these under the names of "Colt," "Palomino," "Pinto," "Stud," "Stallion" and "Mustang." (R. App. 9, 10, 16.) He was aware of the dictionary definition of "Mustang" and of its use as the name of an airplane when he adopted the name. (App. 20.) In January, 1962, he applied in the name of a proprietorship, Westward Coach Manufacturing Company, for an Indiana State trademark registration of the mark "Mustang—and a pictorial representation of a leaping horse." He described the mark on which the goods had been used as being "utility coaches, *vehicle-carried accomodation* (sic) *for campers or travelers,* vans and the like." (App. 21.) In September, 1962, Westward was incorporated and Enochs' business and assets were transferred to Plaintiff. (App. 20.) Commencing in 1962, Westward began manufacturing travel trailers (a trailer towed behind an automobile), and during the next four years also manufactured a few chassis-mounted pick-up campers. The trademark "Mustang," as well as other trademarks, was applied to these travel trailers. (R. App. 14-15.)

Westward is in a large industry. A partial listing in 1965 of the manufacturers in the industry occupied seventy pages of a trade journal. (R. App. 23.) Total industry sales of pick-up campers and trailers during the period 1960 to 1965 exceeded 875,000 units. (R. App. 8.) Westward's total sales during the same period were 1,234 units, of which 865 bore the name "Mustang." (R. App. 15-16.) "Mustang" campers and trailers represented less than one-tenth of one per cent of the industry total. In the six-year period, Westward made no sales at all in seventeen of the states. In the same six-year period the sales in twenty other states were less than fifteen in any one state in total. In only eight states did Westward's total sales over this entire six-year period exceed twenty-two "Mustang" units. (R. App. 15.)

Westward's sales of units bearing the name "Mustang" increased during the six-year period. (R. App. 15.) Use of the name "Mustang" began in 1962 on travel trailers. The sales of "Mustang" trailers were two in 1962, 79 in 1963, 89 in 1964, and 239 in 1965. (R. App. 15.) After the introduction by Ford of its "Mustang" model, Westward became aware of four firms in its industry that had adopted, or sought to adopt, the name "Mustang" for their products. At Westward's request, three of the uses ceased. (R. App. 10, 18-19.)

An analysis of Westward's costs for the three-year period prior to bankruptcy proceedings showed that its units were being sold for a price well below the cost of production, even though its sales prices were being increased in each year. (R. App. 65.) Enochs testified in the bankruptcy proceedings that the contributing factors that brought about the financial difficulty of Westward were labor problems, low prices, lack of production, and pilferage. (R. App. 11.) No mention was made in the bankruptcy testimony of Ford's use of the name "Mus-

tang" as being a contributing factor although the suit was much discussed.

Purchasers of Westward out of the bankruptcy desired to purchase the assets of the company. Westward's counsel had advised that if the company were not a going concern and coaches were not being produced or made under the name "Mustang," the law suit against Ford would be jeopardized. He advised that the only way the purchasers could acquire the company and preserve the law suit was by a Chapter XI reorganization. (R. App. 32-33; R. App. 66.) Attorneys for the four purchasers of Westward said they thought the law suit against Ford was worthless. (App. 33; R. App. 66.) Enochs in the bankruptcy suit, in response to an inquiry as to whether he had received advice of counsel as to his chance of success in the Ford suit, responded "actually, most counsel sort of pass it off as a joke. They feel there is a very slim chance of anything." (R. App. 12.)

The Bankruptcy Court finally approved a plan allowing Enochs to retain fifty per cent of any recovery in the litigation, provided that he surrendered a claim of $6,700 against the bankrupt and paid all expenses and attorneys' fees of the litigation. (R. App. 68.)

(ii) Respondent's Business.

Ford is a pioneer in the manufacture and sale of truck and passenger vehicles. Its passenger vehicle lines are popularly known as Ford, Mercury and Lincoln cars. These lines are further distinguished by secondary model names such as Thunderbird, Galaxie, Fairlane, Falcon, Mustang and Continental. (App. 26.) Other competing manufacturers in the automotive industry follow the same general plan of using car-line names and secondary model names. (App. 26.) The car-line names are the principal designation appearing on each vehicle. The model names dis-

tinguish models in the particular line. The camper and trailer industry, including Westward's business, is dependent upon the products of the automotive industry, including Ford's business, to provide mobility for the full use of the camper or trailer by the user. (App. 26.) Ford, as does the rest of the automotive industry, markets its products throughout all of the states of the United States through independent franchised distributors and dealers who advertise and sell the new products of Ford and advertise and sell the trade-in used products of all automotive manufacturers. (App. 26.) Ford, as do others in the automotive industry, provides a written warranty of its products, including its Ford "Mustang" automobile, to the ultimate purchaser and user when the automobile is acquired from the dealer. (R. App. 64.) Each such warranty identifies the source of the vehicle as being Ford. The distribution of the Ford "Mustang" automobile has been substantial in every state. (R. App. 79.) The automobile is sold through authorized Ford Dealers. (R. App. 26-27.)

During the year 1962, the Defendant manufactured an experimental sports vehicle which it named "Mustang." (R. App. 51.) It was not produced for sale, but was displayed at vehicle shows. Westward, on December 10, 1962, wrote Ford that Westward had been using the name "Mustang" since September of 1960 on its trailers and campers, and requested that Ford cease using the name. (App. 67-69.) Ford acknowledged Westward's letter, stating that the name "Mustang" had been used for many years by others and that there was no likelihood of confusion with its products. There was no evidence that Ford knew of Westward or of its use of the name "Mustang" prior to Westward's letter to it. Also, Ford stated that Westward did not have "any exclusive right to use the name 'Mustang'" and that Ford had not infringed any rights of Westward by its use of the name on a display car.

(App. 70-71.) In 1964, Ford began mass production and sale of a vehicle with the model name of "Mustang" accompanied by the representation of a horse. (R. App. 51.) A $6,000,000 advertising and promotion program was instituted. Since such initial production, through the summer of 1965 another $10,000,000 had been expended by Ford in advertising and promotion programs of its automobile with the model name "Mustang." (App. 29; R. App. 51.)

During the first eighteen months after introduction, Ford sold 645,416 "Mustang" automobiles. Sales were made in every one of the fifty states. (R. App. 79.)

Ford at one time considered the proposal made by Westward's former sales manager for a joint promotion that was not consummated. (R. App. 13-14.) Ford does not manufacture, or sell, or advertise any of its products under the name "Mustang" or with the depiction of a horse, which is convertible to use as a trailer. (R. App. 53, 62.)

(iii) The Name "Mustang."

"The very word *mustang* is of long ago."[1] It was not coined by Westward. (R. App. 25.) It is not a distinctive or novel word. (R. App. 25.) It is a noun found in dictionaries and in common use for over 150 years, identifying the wild or half-wild horses of the Southwest United States and Mexico descended from the stock introduced by the Spanish conquistadores. (R. App. 26.) It was derived from the old Spanish word "mestengo," an adjective meaning "wild, having no conqueror."[2]

"Mustang" has since the Civil War identified a naval officer risen from the ranks and was the name of a famous

1. *Mustangs and Cow Horses* by Dobie, Boatright and Ransom, SMU Press (2d ed. 1965), page 3.

2. (R. App. 26.) An even more remote origin exists. A small kingdom of Nepal, founded in 1380, is named "Mustang." ("National Geographic," October, 1965.)

attack plane in use during World War II. (R. App. 26.) It is also the name of Southern Methodist University's football team. (R. App. 27.)

"Mustang" was used as the name of many products before Westward adopted it.[3] It was federally registered as a trademark at least twenty-six times, for a variety of products, prior to Westward's adoption and use. (R. App. 78.)

(iv) The Depiction of a Horse.

There have been at least 250 registrations of trademarks which included the depiction of a horse. (R. App. 78.) The name "Mustang" in combination with the representation of a horse had been federally registered as a trademark many times. (R. App. 75, 78.)

(v) Use of "Mustang" After Defendant's Adoption of It.

"Mustang" has become one of the best known names in advertising since Ford's "Mustang" model has been marketed. It has been adopted as the name of all kinds of products from sweat shirts and water skis to sailboats and homes. (R. App. 52-53.) Ford's "Mustang" automobiles are the favorite top prizes in contests and give-aways. (R. App. 52.) It is the prime object of tie-in product advertising by suppliers to Ford Motor Company, such as General Tire, Johns-Manville, Du Pont, Fram, Alcoa, and many others. (R. App. 52.) Individual merchants, small manufacturers and such giants as Longine Watches, General Electric, Listerine, Dobbs Hats, Minute Rice, Purina Dog Chow, and Cudahy Meats used "Mustang" automobiles for prizes in advertising contests. (R. App. 52.) "The hottest new product in history"[4] has caused companies, both

3. Some of the products included tractors, motorcycles, engines, trucks, automobile parts, cranes and clothing. (R. App. 52.)

4. "Newsweek" Magazine, April 26, 1965.

large and small, to use the name "Mustang" in some way to promote their own sales. (R. App. 52.) After Ford's use of it, the name "Mustang" has been adopted as a trade name for at least thirty-one businesses (R. App. 42), as a trademark for at least fifty-three products (R. App. 52-53), and trademark registrations have been sought for it by eighteen companies. (R. App. 78.)

Frank Rizzo, Westward's sales manager, who had authority to promote the sale of Westward's products, early in 1965 approached Ford to secure two Ford "Mustang" cars to be used to tow two of Westward's trailers on a promotional tour to sell Westward's trailers. (R. App. 13.) Rizzo thought the use of Ford "Mustang" cars in the tour would boost sales. (R. App. 13.) A letter had been written by Rizzo to Ford outlining the tour when Enochs (Westward's president) told Rizzo to stop the promotion. (R. App. 14.)

Westward has not, since the production of the "Mustang" by Ford, promoted any of its other names—"Colt," "Stallion," "Stud," "Pinto" or "Palomino"—which it previously used to some extent. (R. App. 44.) All were dropped with the exception of "Palomino" before the bankruptcy reorganization. Since the reorganization, only the name "Mustang" has been used by Westward. (R. App. 12.)

(vi) Use of Names in Common in Respective Parties' Industries.

It has long been a common practice for names of popular cars to be used by manufacturers in Westward's business for their products. (R. App. 29-42; 53-63.) Thus, there is an Imperial automobile made by Chrysler and seven manufacturers in Westward's line of business use the name for their products. (R. App. 35.) Ford manufactures a Continental

automobile. Three manufacturers in Westward's line of business use the name for their products. (R. App. 31-32.) Most of the well-known names—such as BelAire, Capri, Century, Galaxie, Fury, Falcon, Fairlane, Electra, El Dorado, Dart, Lark, Monterey, Pontiac, Skylark, Thunderbird, and many others—are used in both Westward's and Ford's industries. There are at least fifty-four names used for products both in Westward's industry and in Ford's. (R. App. 29-42; 53-63.)

The United States Patent Office has granted registrations of Apache for trucks by General Motors (1957), and for camp trailers by Vesely Mfg. Co.; Falcon for cars by Ford (1959) and for mobile homes by Rimer, Inc. (pending); Imperial cars for Chrysler (1930) and for house trailers by Stanley N. Lewis (1961); Montclair cars by Ford (1957) and for mobile residences by Montclair Mobile Homes, Inc. (1959); Ranchero vehicles by Ford (1957) and for trailers by Vought Industries, Inc. (1955). (R. App. 29-42; 53-63.) A recent decision of the United States Patent Office rejected the registration of "Holiday Rambler" for a trailer in view of the opposition of American Motors Corporation, the manufacturer of the Rambler automobile.

American Motors Corp. v. *Klinger Products Corp.* (1965), 146 U. S. P. Q. 674.

On appeal to the United States District Court, the Court, with the parties' consent, entered a decree on November 16, 1967, mandating the registration. (Civil Action 5144, United States District Court, Western District of Michigan.) With the overruling of the White opposition to Petitioners' own registration, there has been a consistent pattern of the common use in both the automotive and trailer industries of identical names for the respective industries' products without any likelihood of confusion.

(vii) Westward and Ford Do Not Compete.

Westward does not build automobiles and has no plans to do so. (R. App. 42-43.) Ford does not build mobile homes, motor homes, travel trailers or pick-up campers, and has no plans to do so. (R. App. 53; 66-67.)

The products of both parties are sold through dealers. (App. 26.) Some automobile dealers have taken on lines of products produced by others, including those of Westward's industry. (App. 82.) Automobile dealers may be about ten per cent of the total of all dealers in Westward's industry. (R. App. 8.)

(viii) Identification of Source by Ford.

Ford spent $16,000,000 between April 17, 1964 and September 31, 1965 advertising its "Mustang" model automobile. (R. App. 51.) In all of the advertisements of its "Mustang" automobile, the name of Ford is prominently displayed (R. App. 51), as is "Ford" upon the vehicles themselves. (R. App. 63.)

Ford has never passed its Ford "Mustang" automobile off as the product of Westward. (R. App. 43-44.) No one has been confused as to the source of Ford's "Mustang" model. (R. App. 24-25, 43-44.)

(ix) Identification of Source by Westward.

Westward's advertising has been done through brochures, trade journals and industry shows. No purchaser of Westward's products has been confused as to the source of such products. (R. App. 24.)

(x) Price Ranges of Respective Products.

Westward's products are high-priced in their market, as compared to other similar products of competitors, and are

purchased by people who prefer quality products. (R. App. 10-11.) The wholesale prices for Westward's products, which sometimes were $100.00 to $200.00 more than the retail price of comparable competitors' units (R. App. 10), ranged from $1,995.00 to $2,895.00. (App. 50.) Westward's president knew of no campers or wood-type trailers which were more expensive than his. (R. App. 10-11.) Prices on Ford's "Mustang" models ranged as high as $3,055.47 wholesale, and $3,831.50 retail, and as low as $1,917.78 wholesale, and $2,390.50 retail. (R. App. 64.)

(xi) No Dispute as to a Material Fact.

In open court at the hearing on the Summary Judgment Motion, the record shows the following agreement of the parties:

> "Plaintiffs and Defendant agreed that the Motion for Summary Judgment presented substantive questions of law in the area of trademarks, tradenames and unfair competition." (R. App. 75.)

The District Court found that there was no genuine dispute on a material fact. (App. 41, 55, 58.) The Court of Appeals affirmed this conclusion. (App. 58.)

There are some statements made by Petitioners or their witnesses which are in conflict with other statements made by Petitioners or their witnesses. None go to dispositive facts. Most relate to damages which, of course, was not before the Court on the Summary Judgment Motion. The question is whether the Defendant, Ford, did any wrongful, actionable act. The question of damages arises only after the issue of an actionable right is settled.

At the conclusion of a paragraph in Petitioner's "Statement of the Case Facts," it is stated:

> "Business got so bad that bankruptcy ensued in the winter of 1965." (Pet. 6.)

In the context of what preceded the statement, the inference is that bankruptcy resulted from those things. The statement is totally inconsistent with Enochs' (Westward's president) testimony under oath in the bankruptcy proceedings where no representative of Ford was present. There he said the financial difficulty was due to four causes:

(1) "labor problems;"
(2) "low prices;"
(3) "lack of production;" and
(4) "pilferage."

No mention was made in the bankruptcy testimony by Enochs or any other representative of Westward of Ford's use of the "Mustang" name as being the cause of bankruptcy, although creditors inquired about this suit which was then pending. (R. App. 11-12.)

The inference that it was due to sales is also false. The record shows the sales of Westward units bearing the name "Mustang" to be as follows:

1960	1961	1962	1963	1964	1965
20	107	126	170	156	286

(R. App. 14-15.)

In 1964 Westward moved to its new plant (App. 83) and Ford introduced the "Mustang." (R. App. 51.) Westward's sales of "Mustang" units soared 83.3% in 1965. The real explanation of what produced the bankruptcy came from Westward's own accountant's testimony in the bankruptcy proceedings. He made a survey of three years, which showed (R. App. 65):

	1963	1964	1965
Average sale price of units sold	$1,840.52	$1,863.61	$1,988.14
Excess of cost over sale price ..	61.19	63.15	159.28

Coupled with the fact that Westward, after the entry of the Ford "Mustang," was rapidly dropping all other names in favor of "Mustang," and the owners after the bankruptcy dropped *all* names but "Mustang," the false and misleading nature of the Enochs' affidavits and Petitioner's statements are apparent. (R. App. 12, 44.) Further, as noted, they are irrelevant on a Summary Judgment Motion and, therefore, could be injected only to color the facts and prejudice the Court.

The statement is made:

> "Non-Ford dealers stopped handling Westward's 'Mustang' products . . ." (App. 77, 78, 82.)

Again, the relevancy is only to damages—an issue not before the Court on the Summary Motion. The references do not show that *all* "non-Ford" dealers stopped handling "Mustang" products.

In the petition the statement is made:

> "Very widespread and intensely strong actual confusion has been shown, which has severely injured Westward (even though the glittering success of Ford's 'Mustang' for Ford might cause an unthinking person, on a first-glance supposition, to jump to an erroneous conclusion that Ford's use would automatically benefit Westward)." (Pet. 2.)

The District Court searched the records and many affidavits of Petitioners (App. 8-18) and concluded on the subject of confusion as follows:

> "The massive advertising by the defendant and of its franchised distributors and dealers of defendant's products, including the MUSTANG automobile, together with the practice of the delivering of the written warranty to buyers clearly communicated at all times in question beyond any doubt to the public that the defendant was the manufacturer, seller and warrantor of the MUSTANG automobile. The force of the massive

advertising left no doubt in the public mind of the defendant's origination of the MUSTANG automobile even if the public was in the past or in the future became acquainted with the extensive history of prior use of the name MUSTANG accompanied by the representation of a horse by many other manufacturers with their many products. The public has never been, is not now, nor ever will or could be confused, or misled, or deceived by the defendant in the use of the name MUSTANG, accompanied by a representation of a horse, that any one other than the defendant was the originator, seller and warrantor of the MUSTANG automobile. There is no likelihood that the public has been, is now, ever will or could be confused over whether or not the plaintiffs were, or are the originators, sellers and warrantors of the MUSTANG automobile. (App. 27-28.)

* * * * *

"The defendant has avoided any claim of confusion of the origin of its automotive product by immediately and continually informing the public that the MUSTANG automobile was a product of defendant. From the outset of the MUSTANG automobile's production it has acquired a secondary meaning in the automobile industry and in that market. There is no deception of the public or likelihood of public confusion, or the palming off of defendant's product upon the good name, or service, or other attributes of plaintiffs' enterprise that it may have acquired. The public is informed that the MUSTANG automobile is a product of defendant." (App. 30-31.)

The Circuit Court of Appeals, commenting on this phase of the District Court's opinion said:

"In the court's view there is no likelihood, considering the significance of an automobile or trailer purchase and the discerning character of dealers and users of automobiles and trailers, of their confusing the origins of Ford's and Westward's products. Whatever confusion might result concerning the origin of Westward's products is, the court felt, within the risk West-

> ward took by choosing and developing a weak trademark and is, for that reason, not actionable." (App. 57-58.)

The Court further said there was "slight evidence" of confusion as to the source of Westward's product (App. 60) and concluded:

> "The tests of unfair competition and trademark infringement formulated by the Indiana courts, as in *Hartzler*, do not embrace the latter type of confusion."

Conclusive on confusion are Petitioner's responses to Ford's interrogatories 66 and 67. The response to 66 was that Plaintiff (Petitioner) "has no knowledge of anyone who purchased of Plaintiff thinking it was produced by Defendant (Ford)." (R. App. 24.) The response to 67 was that "Plaintiff has no knowledge" of any person who purchased a "Mustang" automobile who thought it was produced by Westward. (R. App. 24-25.)

(xii) Statements Outside of the Record.

On page 11 of the Petition, it is stated:

> "And continuing even today in 1968 it (Westward) is still in bad financial trouble, even though it has gone through three sets of administrations still struggling to maintain the 'Mustang' line, and even though product-quality and various other changes have been made."

This statement is wholly outside the record as counsel knows. It is intended to be so prejudicial and is so inaccurate that it should not be left in the Court's mind as it stands. A deposition was taken (and is on file in the District Court) of one of the present shareholders of Westward in connection with the pending counterclaim on the federal trademark. The witness there said another shareholder "had broken his commitment" to finance the company. Also, as anyone in Shelbyville, Indiana (where West-

ward's plant is now located) knows, new trailers and campers are rolling out of the plant to a lot where a score or more are awaiting shipment—all bearing the name "Mustang!" The local dealer in "Mustang" trailers and campers at the other end of town is a Chrysler dealer who has many "Mustang" units on display with his Chrysler and Plymouth automobiles.

The Court should disregard both statements—Petitioners and ours.

(xiii) The Federal Registration of "Mustang" by Westward.

Until about the time of Enochs' deposition on July 22, 1965, Westward used upon its products a truck hood ornament purchased from White Motor Corporation, a motor truck manufacturer, which ornament White used upon its truck products. The ornament carried a "five or six inch horse with the name 'White' across the rump." (R. App. 9, 42, 44.)

On October 22, 1962, Westward applied for a federal trademark registration. (R. App. 45.) The application for registration was first refused by the Patent Office since the mark was like the "Mustang" mark previously registered by the Mustang Trailer Company. Westward ascertained that the Mustang Trailer Company was no longer in business and obtained cancellation of the registration on the ground of abandonment. (R. App. 48.)

In its federal application and two amendments thereto, Westward successively described the products upon which the goods had been used as:

> First description—"Utility coaches, vans, vehicle-carried accommodation for campers or travelers."
>
> Second description—"Camper bodies for pickup trucks or small trucks, truck campers, and travel trailers."

Final description—"Utility van bodies mountable on pick-up trucks and small trucks for providing trailer-type housing and storage accommodations for travellers and sportsmen, coach bodies known as campers for providing such accommodation and mountable on an associated vehicle or carrying unit such as a truck or boat unit, such as pontoon frame, and trailers."

The successive amendments were required because of the position of the Patent Office that the preceding designations were too indefinite. (R. App. 45-46.) The application limited to the final description of goods was opposed by White. (R. App. 46.)

White had used and registered its "Mustang" trademark with the depiction of a horse prior to Westward's first use of the name and horse representation. (R. App. 46.) White's opposition was upon the grounds that the use of "Mustang" with a horse on the hoods of its trucks having the "Mustang" engine in them and on Westward's campers and trailers would create confusion. Westward took the position that there were "significant differences in the nature" of White's goods and trailers and campers. (R. App. 46.)

An agreement was entered into between White and Westward concerning White's opposition, reading in part as follows:

"1. Promptly after the execution of this Agreement, the attorneys for the parties will execute on behalf of the parties, a Stipulated Motion dismissing the opposition with prejudice and cause such stipulated motion to be filed in the United States Patent Office.

2. WHITE hereby covenants not to sue WESTWARD for trademark infringement for use of the trademark MUSTANG and/or a pictorial representation of a horse so long as WESTWARD limits its use of such trademark and/or representation in the manner set out in paragraphs 3-5 below.

3. WESTWARD hereby agrees to forthwith discontinue the use of MUSTANG emblems obtained from WHITE whether or not they include the trademark WHITE.

4. WESTWARD agrees to and forthwith will cease to use the trademark WHITE and/or a pictorial representation of a horse identical to or confusingly similar with pictorial representation of a horse used by WHITE as set forth in the appendices to the above-identified opposition.

5. WESTWARD agrees it will not commence to manufacture and sell, under the trademark MUSTANG any product which is apt to be, in the eyes of the purchasing public, confusingly similar as to source or origin with any product of WHITE."

(Request to Admit, United States District Court for the Southern District of Indiana, Cause No. IP 65-C-199.)

On July 5, 1967, pursuant to the prior stipulation, the opposition of White was dismissed with prejudice. (Request to Admit, United States District Court for the Southern District of Indiana, Cause No. IP 65-C-199.)

On September 5, 1967, after Westward's appeal to the Court of Appeals, the name "Mustang" with the depiction of a horse was registered on the Principal Register in the United States Patent Office in Westward's name for trailers and campers. (R. App. 50.)

ARGUMENT.

Petitioners have shown no reason under Rule 19 of this Court for the granting of a Writ of Certiorari. Accordingly, the petition should be denied.

The complaint is in three counts. The first is for infringement of an Indiana registered trademark. The second is for infringement of a common law trademark. The third is for unfair competition. Jurisdiction in the federal court was founded solely upon diversity of citizenship and the amount of damages in controversy. (App. 2.)

The District Court granted Respondent's Motion for Summary Judgment on all three counts, finding that there was no dispute of a material fact and "there is no deception of the public or likelihood of public confusion, or the palming off of defendant's product upon the good name, or service, or other attributes of plaintiffs' enterprise that it may have acquired. The public is informed that the Mustang automobile is a product of defendant." (App. 30-31.)

The Court of Appeals, without dissent, affirmed the Summary Judgment. It found no genuine issue as to a material fact. That Court said:

> "In the court's view there is no likelihood, considering the significance of an automobile or trailer purchase and the discerning character of dealers and users of automobiles and trailers, of their confusing the origins of Ford's and Westward's products." (App. 57.)

INDIANA LAW PROPERLY APPLIED.

In deciding this case, the lower courts strictly followed the law as interpreted by this Court.

Obviously, Indiana law applies to the count upon the Indiana registration. It also applies to the other two counts.

This Court has settled the question of what law applies in a case such as this one. In another diversity case for infringement of a common law trademark and unfair competition it granted certiorari "in order to determine whether local or federal law should have been applied. . . ." The Court in its opinion declared:

> "The only cause of action that this record could possibly support is for unfair competition and common law 'trademark infringement,' to which local law applies."

The Court then said:

> "The decree will be vacated . . . , and the cause will be remanded to the Circuit Court of Appeals, *to afford it opportunity to apply the appropriate local law. . . .*"*

Pecheur Lozenge Co. v. *National Candy Co.* (1942), 315 U. S. 666, 667, 86 L. ed. 1103, 1105.

The Court of Appeals properly applied the Indiana law. (App. 58-61.) We know of no case which challenges *Pecheur*.

Petitioners do not question what the Indiana law is or that it was correctly applied by the Court of Appeals or the District Court.

Petitioners merely suggest that their unsupported theories of what the law ought to be, which are not even related to the admitted facts of this case, "seems" to "require a reexamination" of such cases as *Pecheur*. (App.

* Our emphasis throughout the brief unless otherwise indicated.

20.) *Pecheur* has not been overruled or modified by this Court. Courts, including the Seventh Circuit, have consistently applied the rule of that case.

Addressograph-Multigraph Corp. v. *American Expansion Bolt & Mfg. Co.* (7th Cir. 1941), 124 F. 2d 706; *cert. den.* 316 U. S. 682, 86 L. ed. 1755;

American Photographic Pub. Co. v. *Ziff-Davis Pub. Co.* (7th Cir. 1943), 135 F. 2d 569, 572;

Philco Corp. v. *Phillips Mfg. Co.* (7th Cir. 1943), 133 F. 2d 663, 666.

Wholly apart from *Pecheur,* the Petitioners waived any right to question the application of Indiana law. Indiana has adopted the Uniform Judicial Notice of Foreign Law Act. (Burns' Ind. Stat. § 2-1652 [1968 Repl.].) When, as required by the act, Petitioners did not declare either in the pleadings or by notice, that they believed the applicable law to be different than Indiana law, the law of the forum was properly applied.

Fardy v. *Mayerstein* (1943), 221 Ind. 339, 349-351.

Rekeweg, the only case cited by Petitioners on the question of the applicable law, has nothing whatsoever to do with this case. It was a personal injury case where the parties had agreed that Ohio law applied. The Seventh Circuit Court of Appeals affirmed the lower court's holding that in these circumstances Ohio law applied to an action based on defendants' having fraudulently prevented plaintiffs from filing a claim against decedent's estate in Ohio.

Rewekeg v. *Federal Mutual Insurance Company* (7th Cir. 1963), 324 F. 2d 150-51.

THE FEDERAL REGISTRATION NOT IN ISSUE.

Federal registration was granted to Westward after briefing this case in the Court of Appeals and shortly before the argument. The complaint, the evidence, and the briefs were not directed to it. The Court of Appeals, therefore, properly ignored the registration in its opinion. (App. 53.)

Further, it should be pointed out that the issue of infringement of the federal registration is now pending before the District Court on a supplemental counterclaim filed initially in this action. (R. App. 76-77.)

NO OTHER BASIS FOR WRIT.

Since the law has been properly applied, all of the Petitioners' "Reasons for Granting the Writ" (App. 8-20) are irrelevant.

We would not leave the impression that Indiana law is in conflict with or materially different from the decisions of other courts and forums as applicable to the facts of this case. The Court of Appeals' decision in this case is not in conflict with the three other Court of Appeals' decisions cited by Petitioners or the Seventh Circuit decision cited. For that matter, we know of no decision in conflict with the District and Circuit Court of Appeals' decisions in this case. Even the quoted language in the petition, taken in context, is consistent with the decision in this case.

In *Yale*, defendant had a registered mark for locks and many sorts of hardware. Plaintiffs adopted the mark for flash-lights and batteries sold through hardware stores and sought a decree to compel its registration for such products. The decree was denied. There it was said:

> ". . . the record contains many instances where the defendant's buyers did, or said that they should, sup-

pose the plaintiff's flash-lights to be one of the defendant's products, and it is extremely probable that mistakes will continue unless the practice ceases.

* * * * *

The law of unfair trade comes down very nearly to this—as judges have repeated again and again—*that one merchant shall not divert customers from another by representing what he sells as emanating. . . .*" from another.

Yale Electric Corporation v. *Robertson* (2d Cir. 1928), 26 F. 2d 972, 973.

In *Fleischmann,* plaintiffs had a registered mark of "Black & White" for Scotch whiskey. Defendants thereafter adopted that name for its beer. The court said:

"It is our view, and we so hold, that the average purchaser, as the courts have described him, would be likely to believe, as he noted the Black & White beer in Ralphs' stores, that the maker of the beer had some connection with the concern which had produced the well known Black & White Scotch whiskey.

* * * * *

We cannot conclude but that Maier deliberately adopted the name knowing that Black & White was the name and trademark of Buchanan and they must have done so with some purpose in mind. *The only possible purpose could have been to capitalize upon the popularity of the name chosen.* This popularity, they must have known, would extend to their product because the public would associate the name Black & White with something old and reliable and meritorious in the way of an alcoholic beverage."

Fleischmann Distilling Corp. v. *Maier Brewing Company* (9th Cir. 1963), 314 F. 2d 149, 155, 157.

In *Sweetarts,* the plaintiff had a registered mark "SweeTarts" which was used on candy and other products.

Defendant copied the mark and used it also on candy. The court said:

> "Defendant has adopted the very same word and used it to denominate its candy product. We think the likelihood of confusion arising from this adoption is manifest. The words are exactly the same, each using a large S and large T in the spelling. They are applied to the same general class of product, candy. This, on its face, bespeaks of confusion and infringement.
>
> We do not believe the candy purchasing public who might be exposed to both plaintiff's and defendants' candy can escape the confusion. A person who sees defendants' 5 cent tart tablet for 'kids' marked 'Swee-Tarts' will naturally believe that plaintiff's butter toffees and assorted chocolates, also marked 'Swee-Tarts', come from a common source. Plaintiff, as well as the public, is entitled to protection from a situation, such as this, that is latent with possibilities of confusion, mistake or deception."
>
> *Sweetarts* v. *Sunline, Inc.* (8th Cir. 1967), 380 F. 2d 923, 927.

In each of these three cases, the second user copied the first user's trademark, which was federally registered, for the purpose of a free ride on the first user's good will. The confusion in each case was such that the public was likely to consider the second user's goods or services as emanating from the first user. All involved goods (flash-lights, beer and candy) which are objects of impulse purchase. Such is not the case here. Ford did not obtain a free ride on Westward's good will. Further, trailers, campers and automobiles are not the objects of impulse purchase. The price and infrequency of such purchases makes the discriminating purchaser rule applicable.

The *Tisch* case is in the same category. A motel owner in Chicago copied the name "Americana," using the same style letters, even to the star in place of a dot over the "i,"

which the plaintiff previously had registered and used on its famous hotels in Miami Beach, New York and San Juan.

Tisch Hotels v. *Americana Inn* (7th Cir. 1965), 350 F. 2d 609.

Further, Petitioner's response to an interrogatory makes these cases wholly inapplicable to this case.

Defendant's Interrogatory No. 67:

> "State the name and address of every person known to Plaintiff to have purchased a product of the Defendant bearing the name 'MUSTANG' who believed or thought that it was produced by the Plaintiff, and give in each case the name of the person or persons to whom such belief or thought was communicated."

Plaintiff's Answer:

> "Plaintiff has no knowledge of any such person."

Ford did not trade on the good will of Westward. Contrary to the second users in the above cases, Ford has thoroughly identified its product, the "Mustang" automobile, with the Ford Motor Company and has never attempted to palm it off to the public as Westward's.

The Court of Appeals said that it found "no rational basis for support" for the "suggested doctrine of 'reverse confusion.'" (App. 61.) No case cited by Petitioners supports such a doctrine. But, even if there were such a doctrine, the response to an interrogatory makes it clear that there is no reverse confusion here.

Defendant's Interrogatory No. 66:

> "State the name and address of every person known to Plaintiff to have purchased a product of Plaintiff having the name 'MUSTANG' who believed or thought that it was produced by the Defendant, and give in each case the name of the person or persons to whom such belief or thought was communicated."

Plaintiff's Answer:

> "Plaintiff has no knowledge of anyone who purchased of Plaintiff thinking it was produced by the Defendant; and according to Plaintiff's *belief*,* those persons who thought that Plaintiff's products are produced by the Defendant are persons who have *not* purchased a product of the Plaintiff."

The admission that no purchasers of either Ford or Westward were confused as to the source of the respective products is an insuperable barrier to any relief. The District Court and the Court of Appeals found no confusion or likelihood of confusion which was actionable.

The decision of the District Court and Court of Appeals is consistent with the common practice in the industry for mobile homes, trailers and campers to use names also used on automobiles. Fifty-four such common uses are admitted by Petitioners. (R. App. 29-42.) These common uses are of such well known names as Century, Continental, Dart, Electra, Falcon, Fury, Galaxie, Imperial, Pontiac and Thunderbird. American Motors opposed the federal registration by a trailer manufacturer of "Holiday Rambler," but a consent judgment was entered in that case mandating the registration, as noted above. White Motors opposed Westward's registration since it used "Mustang" and a horse on the hood of its trucks in which it had its "Mustang" engine. Westward secured its federal registration by an agreement with White which stipulates that the registration may be issued and also provides:

> "3. WESTWARD hereby agrees to forthwith discontinue the use of MUSTANG emblems obtained from WHITE whether or not they include the trademark WHITE.

---

* No evidence in the record supports the *belief*. Under Rule 56 of the Rules of Civil Procedure, this portion of the answer is not admissible evidence.

4. WESTWARD agrees to and forthwith will cease to use the trademark WHITE and/or a pictorial representation of a horse used by WHITE as set forth in the appendices to the above-identified opposition.

5. WESTWARD agrees it will not commence to manufacture and sell, under the trademark MUSTANG any product which is apt to be, in the eyes of the purchasing public, confusingly similar as to source or origin with any product of WHITE." (R. App. 49.)

Since White manufactures motor vehicles and parts and accessories for them, this is an admission by Westward that any exclusive right it may have to use "Mustang" for trailers and campers does not extend to motor vehicles and the parts and accessories for them. How then can Westward rationally say here that the use of "Mustang" and the depiction of a horse upon an automobile would be likely to be confused with a trailer bearing "Mustang" and the depiction of a horse?

In light of the common practice in the two industries, the answer of the District Court and Circuit Court of Appeals that there is no likelihood of confusion is obviously correct.

Whether Westward's federal registration of Mustang, issued just before the argument in the Court of Appeals, for campers and trailers is infringed by Ford, was not an issue in these proceedings. It is in issue before the District Court and Westward will have its day in court in due course there. (R. App. 76-77.)

CONCLUSION.

No other reasons for a writ under Rule 19 are present. The Court of Appeals did not decide an important "federal question" in conflict with the decisions of this Court. It properly decided a question of local law in accordance with the law of the forum. It did not decide an important question of federal law which should be decided by this Court. It decided merely a routine state-law trademark and unfair competition question.

The Court of Appeals did not depart from the accepted course of judicial proceedings. No supervision of this Court is called for. Vague references to the Fifth and Fourteenth Amendments and the Commerce Clause are mentioned for the first time in these proceedings in the Petition for Writ. How they have been violated has not been stated or supported in any way.

Petitioners do not cite or discuss any Indiana decisions which are the relevant source of law under *Pecheur*. They merely say that the Court of Appeals made "errors as to an assertion of Indiana Law." (Pet. 19.) At another point they concede that Indiana law does not support them. (Pet. 20.)

As pointed out above, *no cases cited* support the Petitioners' theory. Nor do we believe there are any which support Petitioners' theory. The cases and statutes, including those of Indiana, are cited and properly construed and applied by the Court of Appeals in the opinion. (App. 58-60.) This is not directly challenged.

Truly, what Petitioners seek is to have this Court rewrite the Indiana law in accordance with Petitioners' unsupported notion of what the law ought to be. Changes in the Indiana law, obviously, must be left to the Indiana legislature and the courts of the state. Where the state deci-

sions are consistent with the federal decisions and those of other state courts in their application to the facts of the case, no reason for review exists. Such is the case here. No constitutional questions are involved. The vague references to provisions of the United States Constitution, made for the first time in this case in the Petition, do not present any question which this Court should consider.

We respectfully submit that the writ should not be granted.

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IN THE

Supreme Court of The United States

October Term, 1967

No. 1406

WESTWARD COACH MANUFACTURING COMPANY, INC., and RAY GRAINGER, Trustee in Bankruptcy of Westward Coach Manufacturing Company, Inc.,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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A.

THE DOMINANT ISSUE OF CONFUSION-LIKELIHOOD, AND HERE THE NOVEL QUESTION OF PROTECTABILITY AGAINST "REVERSE" CONFUSION, HAVE NOT BEEN ANSWERED OR REFUTED BY RESPONDENT:

The arguments presented by the respondent's brief generally avoid the key issue of protectability against "reverse" confusion, which the Appellate Court said was present and which was said by it to be the key issue.

As explained further in our petition for certiorari, this trademark case does *not* basically involve the usual unjust-enrichment aspects of a free-ride diversion of trade to the infringing later-user. Instead, the general confusion basic to this controversy is quite unusually the *"reverse"* ; that is, the widespread public confusion caused by an overwhelming later-use, is that the earlier-user is the affiliate of the later-user, rather than vice versa. (Thus, the description of the confusion as "reverse" is in that sense apt, even though instead of reversing the effect on the earlier-user's goodwill for its own goods, this type of "reverse" confusion extends, rather than reverses, the goodwill-jeopardy of the earlier-user's use.)

And, of record, and as explained in our petition, there is a *very strong* showing here of goodwill-prejudicing confusion, *both likely and actual,* in fact very intense and widespread.

Thus, since the basis of trademark protection is the protection against a goodwill-prejudicing likelihood of confusion, and since that confusion-likelihood has been so strongly shown, *it must necessarily follow that any rationalization by Ford which purports to support a result of non-protectability here must inevitably be based upon errors of reasoning, and upon an avoidance of a recognition that confusion-likelihood is the key and over-riding criterion in a trademark protection dispute.*

Thus, although it may perhaps be playing into Ford's hands to dwell here at all upon Ford's supposed defenses (which do not negate the ultimate determination of confusion-likelihood, and thus *cannot* justify a non-protectability here), we do here point out the main fallacies of the respondent's arguments, lest the Court somehow feel that, if unanswered, they possibly justify an overlooking of the

ultimate fact that the ultimate criteria of confusion-likelihood has been established.

In fact, rather than minimizing the respondent's arguments, we *encourage* the Court to consider respondent's arguments very carefully, much more than just a first-glance impression of them, noting how generally they *evade the main issues.* For when this controversy is seen in its true light (that is, that it involves basically a "reverse-confusion" type rather than a conventional free-ride or customer-diversion-specifically-to-the-later-user type, and with the later-use by Ford being in such a closely-overlapping field, and with both Ford's and Westward's "Mustang" products being overall body-type pleasure vehicles for highway use, rather than of less confusion-creating nature, and with the confusion having been strongly shown to be both likely and actual, and with this case not involving any special defense-favoring factors such as in cases where the earlier user is attempting to achieve effectively a product patent), and recognizing that the strong showing of confusion-likelihood and actuality cannot be negated even if one or more tests do not happen to add to a likelihood of confusion, *all of Ford's supposed-defenses are seen to fail.*

With this in mind, and with apologies to the Court for dwelling upon Ford's supposed-defenses which do not and cannot negate the strong showing of confusion-likelihood which itself mandates that protection be awarded Westward, or at least mandate that summary judgment should be denied to Ford, let us look at Ford's main supposed-defenses, and encourage the Court to look at them in the light of this reply, together with the Court's re-examination of our petition itself, which, in contrast to respondent's brief, sets forth the most relevant issues for this Court's

consideration, and the reasons why certiorari should be granted.

B.

RESPONDENT'S SUPPOSED DEFENSES:

1. Supposed-Defense that the Confused Type of Purchasers are only Prospective, Rather Than Purchase-consumating:

Ford attempts to escape liability by distinguishing between the confusion of Westward's *prospective* purchasers, and the non-confusion of Westward's *purchase-consumating* purchasers at the time of purchasing a Westward product. But this escape attempt is illusory and hollow; for it is the very class of *prospective*-purchasers (in contrast to purchase-consumating purchasers) who are lost to Westward by the affiliation-confusion which leads to loss of Westward's goodwill.

Moreover, quite realistically to the type of harm to be prevented by trademark protection, the general test of liability is quite broader than Ford admits, being broad enough to expressly include *prospective* purchasers. For example, the federal statute attempts to preclude *any* confusion; and even the 7th Circuit expresses it as "any confusion of *prospective* purchasers." *Tisch Hotels v. Americana Inn*, 350 F2d 609, at 612 (7th Cir. 1965). Also, e.g., *Restatement of Torts* (Tentative Draft No. 8, April, 1963, Sec. 717, p. 53.

Ford's view apparently is that a later use is to be condoned merely because the relatively fewer persons who went ahead to consumate a purchase did not remain con-

fused at the time of purchase, regardless of the many prospective purchasers who had been confused and who could never be cultivated into becoming consumating purchasers. This view, even though it would make some sense in the free-ride or other types of cases, is wholly illogical in the situation here present, where it is the mistaken assumption of specifically the *prospective* (in contrast to comsumating) purchasers which cost prospects and sales to Westward.

2. Supposed-Defense that No Case Expressly Asserts That a Valid Trademark Should Be Protected Against "Reverse Confusion":

It is true that we present no case on the precise point of law: protectability against "reverse" confusion. We present no cases; for there appear to be no clear-cut cases which we can find on that precise point, either way.

This is precisely a reason why this Supreme Court should now consider the matter; for, as pointed out in our petition for certiorari, business must not be permitted to think that the monstrous might-makes-right notion is the law of trademarks.

Moreover, although we find no cases precisely on the "reverse confusion" protectability, the protection we seek *does come squarely within* the basic rationale of the protectability standards of the federal statute and all other modern-era articulations: *Protection against likelihood of confusion of prospective purchasers as to any supposed business affiliation which jeopardizes the earlier-user's good will as to its goods.*

3. Ford's Assertion that the Law Will Protect A Trademark Against a Confusing Use Only When the Goodwill-Jeopardy is Coupled with Some Other Unfairness, Such as Diversion of Trade, Specific Fraudulent Intent, or Free-Ride, Etc.:

Through the years, trademark law has developed from its infancy stage of recognizing trademark wrongs only in terms of the unjust enrichment of "palming off," to recognize a basic protection of trademark enforcement is that of protecting against likely confusion which would jeopardize the earlier user's goodwill for his goods. Thus, mere likelihood of confusion is universally declared to be the test of protectability (except in special situations not present here, such as the attempt of the earlier user to attain in effect a product patent via trademark concepts).

And, except in such special case-situations not present here, there is no reason why the goodwill-prejudicing confusion-likelihood thus needs to be coupled with the other unfairnesses, before a trademark will be protected. And, accordingly, trademarks are routinely protected with no mention or requirement of specific harm or unfairness other than likelihood of confusion.

Moreover, the devastating loss of goodwill, in a "reverse confusion" situation as here present, is quite likely to cause considerably *more* harm to the earlier user than the diversion of trade more commonly encountered as a basis for relief in the older trademark cases.

4. Ford's Assertion that Prospective Purchasers are Discriminating and Discerning:

Some prospective purchasers may be of this type; but, considering the fact that the recreational vehicle prospective market includes all persons, many are not discrimi-

nating. And, as even the 7th Circuit recognizes, the law protects the "ignorant, inexperienced, and gullible." *Tisch Hotels v. Americana Inn*, 350 F2d 609 at 614 (7th Cir. 1965).

Moreover, a "discriminating purchaser rule" is, as viewed most favorably to the defense, only one *of several* guides as to the determination of the ultimate issue of likelihood of confusion. It thus cannot un-do that likelihood and actuality of confusion which is established by other factors, such as the close relation of the goods and businesses and marketing channels of products both of which are overall vehicles. And, being just one of several guides, and not itself determinative of non-likelihood of confusion, it is no wonder that the "discriminating purchaser rule" has never been applied to deny protectability where the other guides show that confusion is likely.

And, where *actual* confusion of the allegedly discriminating prospects is shown, as here, that *in itself proves for the earlier-user the ultimate issue of confusion-likelihood.* Thus, if the prospects are to be considered discriminating, *as Ford itself asserts,* the actual confusion shown of them *proves* Westward's right to the protection here sought, *even without other argument.*

5. Supposed-Defense that Other Names are Jointly Used:

The fact that names such as "Century" may be jointly used does not un-do the confusion-likelihood *here* present. Thus the joint usage by others of other names is not even relevant; or, if relevant at all, it goes to show an actual fraudulent intent of Ford in deliberately taking the name because Westward was using it.

Moreover, there is nothing in the record to show why the particular joint usages have been co-existing, to even in part justify Ford, by some parallelism to the situation here. For example: Some of those joint usages may co-exist because innocent equities were built over long years; Some may co-exist by permission; Some may co-exist because each desires some hoped free-ride from the other; Some may relate to the large and relatively immobile "mobile homes" which are not as closely related to sports cars as are the recreational vehicle trailers and campers; Some have been enduring since the era when the products and businesses were not as closely overlapping as has been the trend in the 1960's; Some may be of a type less likely to confusingly carry over onto other products, being in the nature of "model" names such as a Buick "Century" in contrast to "make" names such as many people consider the "Mustang" automobile to be, even though they probably know it is in some nature a Ford product; Some may have resulted by a combination of factors including the David v. Goliath reluctance of a smaller company to tackle an industrial giant in litigation to protect the smaller company's own goodwill it is developing for its products.

Regardless of one or more joint usages, which (unless Ford is to admit caused it to deliberately adopt Westward's trademark) Ford's lawyers have now resurrected but which Ford may never have previously considered, two things are most significant: Those joint usages have *not prevented confusion here*, which is the ultimate issue; and Westward is not bound by any free-ride morals of others or other factors which may be the reasons such *other* joint usages co-exist.

6. Supposed-Defense that "Mustang" is a Trademark Used by Others:

The "third party use" argument by Ford includes even uses which Ford admits began *after* Ford's "Mustang" use commenced. Quite obviously, if relevant at all, such later uses *aggravate* rather than excuse Ford's conduct. And as to the pre-Ford and pre-Westward uses, even those in the general automotive field, it is only the specific Westward and Ford products here involved which are both overall-type pleasure vehicles for highway use. These and other reasons showing Ford's "third party use" argument to be non-determinitive to prevent protectability against a use such as Ford's, which does create likely and actual confusion, have been already presented in our petition for certiorari, pages 15 through 17.

7. Supposed-Defense that Indiana Law Has Been Correctly Announced and Applied by the Appellate Court:

This supposed defense is answered by each section of our petition, pages 8 through 20. We of course do not deny that there have been a few Indiana cases involving trademark questions; but, as did the Appellate Court, we point out that the Indiana cases are quite sparse, and that they do not limit protectability. Thus, in the absence of any articulation of Indiana law on the precise point, we are *not* seeking this Court to *change* the Indiana law; rather, we are seeking an *articulation* of common law on a precise point which has not been articulated by Indiana. And, as explained in our petition itself, that articulation involves substantive and basic general principles and rationales of trademark protection as generally understood, not only of Indiana.

8. Ford's Assertion that White Motor Company Somehow Provides for Ford a Hostage Shield:

As a part of a settlement as to registrability (not infringement) with White Motor Company, Westward of course willingly stipulated that Westward would not commence to manufacture and sell any future "Mustang" product which would be apt to be, in the eyes of the purchasing public, confusingly similar as to source or origin with any product of White, it being tacitly understood and unchallenged that Westward's present product line of trailers and campers would not likely cause such confusion. This agreement is saying, as to purposes here at all relevant, no more than that Westward will of course obey the generally accepted (and here advocated by Westward) substantive trademark law by not creating affiliation-confusion.

Further, it should be noted that White has never marketed a sports automobile trademarked "Mustang," which is the specific Ford product which has caused the affiliation-confusion against which protection is here sought. Moreover, there has never been any confusion, likely or actual, and White has never asserted any, between White's "Mustang"-marked products, which are truck-*components*, and Westward's trailers and campers, which are precisely the Westward products which it seeks here to protect. (Respondent's assertion, p. 19, that White's opposition alleged a confusion by Westward's *use* is wrong, as Ford knows; for White's opposition was to Westward's *registration* rather than to its *use*. And there are several confusion-lessening differences in the White and Westward matter than in this Westward and Ford controversy.)

Thus the White matter can be no defense to Ford, whose Ford products, rather than White's, are confusingly re-

lated to Westward's; and the very assertion of White by Ford, as an attempted defense hostage, shows again that Ford consistently attempts to avoid the ultimacy of the criteria of confusion-likelihood, which is present as between the Westward and Ford products here in issue, and is *not* present between Westward and White.

9. Supposed-Defense that Ford Avoids Confusion of Certain Specific Types, Although Not All Types:

Ford self-righteously proclaims that it avoids *certain* ones of confusion-types, such as by carefully marking its products and warranties as being of Ford. But this merely clouds the issue as to the basic and general confusion *here* present (a "reverse" confusion mistake of the public that Westward is a Ford affiliate). All possible self-marking by Ford, and all possible avoidance by Ford of palming off or of taking a free ride on Westward, *do not at all* detract from the "reverse" confusion here likely and actual; all possible careful Ford-labelling, instead, probably *increases* rather than decreases the chance of the "reverse confusion" which is precisely the very type of harmful confusion basic to this case.

(If it be viewed as an anomaly or contradiction, that careful truthful labelling can *add* to public confusion as to source-affiliation, that gives another reason why this Court should look into this basic matter of trademark protection, by granting certiorari. Actually, the apparent anomaly is easily understood as being another example of the fact that a use of an identical term in this closely-related a use cannot be condoned; for careful marking cannot always prevent even the usual trademark confusion *of* the second-user being an affiliate of the earlier-user, and thus it is no wonder that careful marking cannot prevent the "reverse" confusion of the type here basically present.)

But regardless of how rationalized, and even if seen to present an anomaly, the Ford-labelling has *not* prevented the likely and actual confusion of the specific "reverse" type *basic to this case*; and thus Ford's careful labelling and avoidance of palming off, free-ride, and other aspects mentioned as present in many other cases, cannot be a bar to the protection Westward seeks as to its own products. *"Reverse" confusion is not and cannot be avoided by the second-user's careful self-labelling.*

10. Supposed-Defense of Ford's Assertion that Westward's Damage Was Only of a Technical or Non-demonstrable Nature:

This supposed-defense is fully answerable merely by our pointing out that no actual confusion nor examples of actual damage need be shown as a pre-requisite to protecting a trademark against confusion, and particularly not at the summary judgment level here present.

But if the Court nonetheless is curious about the matter of actual damages in view of any supposition that Ford's use would benefit Westward, or in view of Ford's assertions that it did, we point out that Ford's rationalization overlooks several significant facts: (a) The 1965 Westward business downfall and bankruptcy was the result of loss of sales preditions on Westward's more profitable line, which necessitated money-losing steps to bolster sales, which, even though several factors contributed to a 1965 increase in sales quantities, worsened the profit picture (as Ford's asserted values clearly show) to an unendurable condition in contrast to a profit-and-loss sheet which in the early or pre-Ford years had been quite acceptable, considering the single-family ownership and salaries taken and advertising and other promotional investments for the future; (b) Westward was and has been frantically strug-

gling to survive yet rightfully maintain its "Mustang" goodwill, rather than build up law suit statistics which could be analyzed in the superficial manner Ford advocates, Ford's manner not taking sufficiently into account accumulative hardship and effect of the other factors here summarized; (c) The trademark "Mustang," rather than the Westward model names, had always been the basic trademark of Westward's prestige line, and was the Westward trademark to which a most substantial portion of its advertising and invested goodwill was tied; (d) The years 1964 and 1965 were good sales years for recreational vehicles generally, and thus much of the 1964 and 1965 sales may be accounted for by the generally-prevailing good sales and by the previous goodwill built by Westward's previous use and advertising; (e) A quadrupling of Westward's facilities had been started in the winter of 1963, this capacity accounting for some of the boost in 1964 and 1965 sales which formerly would have been turned away; and, being but one of a series of theretofore-successful expansions by Westward, indicates the reasonableness of Westward's 1964 and 1965 forecasts; (f) Not only the Enochs administration of Westward failed after Ford began its infringement, but successively two other administrations have failed, attempting to carry on the "Mustang" line. (The very deposition cited by the respondent as recently filed in the District Court, being by a present owner of Westward, states that the name "Mustang" "*doesn't sell trailers*" even though "people *say* it is a fine name," and that the Ford-confusion is a factor in Westward's current financial hardship, which the same owner has subsequently re-affirmed, by affidavit also filed with that Court, as being now increasingly desperate.)

Ford with apparent egotism cannot bring itself to believe Westward's damage, just as most all egotistical trademark

infringers cannot seem to believe they will hurt the earlier user; but the allegations of Westward's damage are tragically true nonetheless.

Ford's egotistical boasting of its "Mustang" popularity as contest prizes illustrates Ford's fallacy and lack of self-criticism in evaluating statistics; for quite obviously, a Cadillac would be more appreciated than a "Mustang," by many, if it did not cost the contest-sponsors too much to offer Cadillacs. Viewed in this light, the Ford method of statistical analysis is seen to be quite questionable; for, considering the above factor, the high rate of Ford "Mustangs" as contest give-aways really *just means that they are a lot cheaper than Cadillacs.*

Much more proof will be provided on actual damages when the time comes.

11. Supposed-Defense that Ford's Infringement was not Specifically Stressed in the Bankruptcy Proceedings in 1966:

At the time of the January, 1966, bankruptcy proceeding, Mr. Enochs had not yet obtained the documented evidence, which he now has, to prove to the creditors his view that Ford was the significant cause of Westward's progressively worsening financial condition. He knew his trademark counsel had not been able to find any case which clearly and unequivocably mentioned "reverse" confusion as being a wrongful creation legally. All the creditors present already knew of this suit against Ford (it had just been mentioned in the bankruptcy testimony, as well as previously), and thus he knew that they already knew he personally felt that Ford was the significant cause. Making matters worse, he knew that the creditors and others had repeatedly echoed the suspicions and accusa-

tions he had endured from Ford's attorneys in oral deposition and written discovery matters, to the general effect that he was not believed in his assertions of a Ford-caused harm. Whatever their reasons, such as the false notion that "any publicity is good publicity" or the false notion that a mistaken Ford-affiliation would automatically be a blessing to Westward, he knew that the creditors in a dismal bankruptcy scene had not believed him and would not believe him as to the Ford-relation of his company's difficulties. He knew his trademark counsel was not present.

With that situation in mind, Mr. Enochs no doubt realized that for him to then again assert the blame to be Ford's would have necessitated him to have, singlehandedly, litigated this entire trademark suit *in and as an incident to the bankruptcy*. So, without lieing, he did avoid extra references to Ford which were not directly pressed or pursued in the questioning, mentioning in that portion of the testimony only other factors, and letting his reason of low sales prices not again explained by his known view that the Ford-confusion was a major part of the buyer-reluctance which meant Westward's sales price did not support his extra-effort steps which worsened his profit picture. *Ford should be ashamed that it even tries to make anything out his woeful plight on that humiliating day of gloom*, which the subsequently-obtained and subsequently-evaluated evidence has proven to have been Ford's fault.

But be that as it may, there never before has been any rule that an infringement would have to actually be a cause of an actual bankruptcy for it to be at all actionable; and Ford's assertion relating to the bankruptcy causes, at the summary judgment level, shows once again that Ford is trying desperately to avoid the ultimate issue of confusion-likelihood as controlling here.

12. Supposed-Defense that Westward's Mr. Rizzo Had, During the Continuance of the Ford Infringement, Sought Co-operation with Ford as a Possible Means to Offset the Harm of the Infringement:

Mr. Rizzo, long *after* Ford's infringement began, and in an effort to boost Westward's lagging sales, truly did attempt to interest Ford in a joint promotion; but the plan was consistently vetoed by Westward's top administration, and was never consumated. (Mr. Rizzo was a relatively new man at Westward at the time, and had not known personally the pre-Ford promising growth of the Westward business. In contrast, the Westward top administration which had controlled Westward in its pre-Ford years of promising growth felt strongly even then that the Ford confusion was the cause of Westward's lagging sales after the Ford entry.)

Even so, any such duress co-operation would not have been an escape for Ford altogether, as Ford tries to assert, *any more than it would destroy actionability for a drowning man to reach up for help from the hand of the very man who pushed him in the lake.* Moreover, particularly considering the duress conditions of lagging sales, it does not negate a confusion-likelihood, which is the basic issue here.

13. Ford's Assertion that Westward's Inquiry to its Dealers was Biased:

The inquiry, which produced the confusion-relating affidavits such as set forth in our petition appendix (p. 74 through 77), was *not* biased. As this Court will hopefully note for itself, by reading the response affidavits there set forth, and the inquiry material quoted in respondent's appendix (p. 2-6), the inquiry can even *appear* to be biased only because the facts of this case do *truthfully* favor

Westward's rightful protectability. Moreover, the inquiry sought and obtained the dealers' *own words*, in the sworn affidavits, clearly sufficient at this summary judgment level.

And be that as it may, the widely prevailing rule is that there is no need for any showing of actual confusion at all, particularly at the summary judgment level, where confusion is otherwise shown to be even likely, as clearly is the situation here, as summarized in our petition, page 6.

14. Ford's Assertion that Westward's Federal Registration is To Be Here Ignored:

Westward's federal registration is a fact, and in a real sense its issuance specifically brings with it an express protectability-standard which ought to have some significance in considering two nation-wide trademark uses, particularly where neither Indiana nor other jurisdictions have articulated on the precise point of *protectability against reverse confusion* which is the basic and controlling issue here.

Moreover, Ford has not changed its operations, in respects here relevant, at all since the Westward registration issued; that is, Ford is presently flaunting Westward's federal registration in substantially the same manner as it flaunted Westward's common law protectability. Thus realistically considering the matter, Ford can scarcely assert that the express protectability-standard of Westward's federal registration should make any objectionable difference.

Further, there is no valid reason (as discussed in the petition for certiorari itself) why the more expressly-broad protectability-standard of the federal staute should not be looked to in articulating the common law on a novel

point, particularly where interstate usage is clearly involved.

And as a practical matter to avoid needless extra litigation, this Court is implored to state its views, as a part of *this phase* of the case, as to the protectability against "reverse" confusion of a federally registered trademark.

For example, in spite of all our arguments as to the logical reasons why "reverse" confusion should be recognized as a type against which protection should be provided, if this Court does not feel that "reverse" confusion of even a federally registered mark is protectable against, this Court should please say so as a part of this present phase of this controversy. A mere denial of certiorari will leave this important aspect of trademark law in the air; and will be of even more damage to nationwide business planning than merely a sanction of its denial to a common law trademark.

C.

CONCLUSION

Apology is again made to the Court for our dwelling here on the various main defenses offered by respondent; for generally those defenses do not relate to the ultimacy of the basic criteria of confusion-likelihood, and generally they attempt to avoid the main issue here: The protectability of a valid trademark for one's own goods, against the likely and actual "reverse confusion," here caused by a forewarned corporate giant who has recklessly and ruthlessly harmed a smaller company.

Since confusion-likelihood and protectability against "reverse" confusion are the main and controlling issues here, only summary-type argument has been given here

to the main defenses asserted by Ford. More complete answer to those and the other asserted defenses will be given in the briefs and hearing on the merits. We have shown that Ford's charges of lieing or misleading are without merit; and others are as to non-relevant points and thus are not bothered here to be specifically refuted; although we deny them.

But again we point out now, all the Ford defenses altogether do not negate the likelihood and actuality of goodwill-prejudicing affiliation-confusion, nor do they show why "reverse" confusion should not be recognized as a type against which a valid trademark use should be protected. These are the key and over-riding issues. All of the supposed-defenses and defense assertions are snbordinate to the confusion-likelihood issue; and since none of them can un-do the confusion likelihood and actuality here strongly shown, it seems imperative for this Court to speak out as to the protectability against "reverse confusion."

In summary, we point out that we have here and in our petition presented sufficient answer to Ford's supposed-defenses; and all of Ford's defenses simply do not refute the petition for certiorari itself. (In capsule form, the general non-relevance of respondent's entire brief may be amazingly observed and confirmed merely by looking at its Index; and, in fact, although the respondent's brief talks *around and about* the general subject matter of the petition, *it does not refute it at all.*) The Appellate decision cannot be left uncorrected, nor at least unheard more fully on the merits by this Court.

It is respectfully urged that certiorari be granted, for one or more of the several important reasons detailed in

our petition for certiorari, and which respondents have wholly failed to refute.

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